No. 92-71

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A FIREFIGHTER IN THE STATE OF OHIO, WHO, ACCORDING TO R.C. 124.45, 124.46, 124.48, AND 124.49, HAS A RIGHT TO A PROMOTION HAS ESTABLISHED A LEGITIMATE CLAIM OF ENTITLEMENT TO THAT PROMOTION IN ORDER TO HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST UNDER 42 U.S.C. §1983.

2. WHETHER A CHARTER MUNICIPALITY IN OHIO IS SUBJECT TO LIABILITY UNDER 42 U.S.C. §1983 WHEN, BY THE ADOPTION AND EXERCISE OF CIVIL SERVICE RULES AND REGULATIONS WHICH ARE IN DIRECT CONFLICT WITH THE STATE CIVIL SERVICE STATUTES AND ARE NOT EXPRESSLY SET FORTH IN THE CHARTER AS REQUIRED BY THE LAWS OF THE STATE, AND ARE THEREFORE ILLEGAL DEPRIVES A CIVIL SERVICE EMPLOYEE OF A PROMOTION TO WHICH HE HAD A VALID ENTITLEMENT UNDER STATE CIVIL SERVICE STATUTES.

3. WHETHER IT IS REQUIRED TO ALLEGE AND PROVE THE INADEQUACY OF STATE REMEDIES IN ORDER TO STATE A CLAIM UNDER 42 U.S.C. §1983 WHEN THE LOSS OCCURRED AS THE RESULT OF THE APPLICATION OF AN UNLAWFUL ESTABLISHED CITY PROCEDURE THAT IS IN DIRECT CONFLICT WITH THE STATE CIVIL SERVICE PROCEDURES THAT SHOULD HAVE BEEN APPLIED AND THAT PROVIDES FOR THE MANDATORY CERTIFICATION AND APPOINTMENT TO THE PROBATIONARY PROMOTED POSITION AND

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PARTIES BELOW

Other parties to the original action were dismissed at the trial level. Therefore, only the city remains as a party.

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph Shirokey, respectfully prays that a writ of certiorari issue to review the decision and order of the Ohio Supreme Court filed in these proceedings on February 26, 1992 and April 15, 1992.

OPINIONS BELOW

This petition seeks review of a judgment of the Ohio Supreme Court that conflicts with decisions of this Court on the issue of whether a firefighter was denied his promotion to Fire Lieutenant without procedural due process. The promotion and accompanying due process were guaranteed by state civil service statutes, however, the rule and procedure the City of Cleveland Heights used in denying the promotion did not contain any procedural safeguards, and was not valid according to the laws of the state, and conflicted with the civil service statutes of the state.

The decision and order of the Ohio Supreme Court in *Shirokey v. Marth* are reported at 63 Ohio St. 3d 113, 585 N.E.2d 407 (1992), and are reproduced in the Appendix at pp. A1 to A18. The Ohio Supreme Court's order denying the petitioner's motion for rehearing is reported at 63 Ohio St. 3d 1442, and is reproduced in the Appendix at p. A45. The Eighth District Court of Appeals' unreported decision is reproduced in the Appendix at pp. A21 to A35. The judgment and opinion of the Cuyahoga County Common Pleas Court granting judgment is also unreported and appears in the Appendix at pp. A36-A39.

JURISDICTION

The decision of the Ohio Supreme Court was entered on February 26, 1992. The petitioner filed a timely motion for rehearing. The motion for rehearing was denied on April 15, 1992. This petition is timely filed within the time period provided by 28 U.S.C. §2101(c) and the Supreme Court Rules 13.1 and 13.4. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved, is the Fourteenth Amendment to the U.S. Constitution. The United States statute involved is 42 U.S.C. 1983. The state statutes involved are Ohio Rev. Code Ann. §§124.45, 124.46, 124.47, 124.48, and 124.49. They appear in the Appendix at pp. A46 to A57. The City of Cleveland Heights Civil Service Rule IV §10(i) is involved and appears in the Appendix at A58.

U.S. Const., Amend. XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of the Facts

Joseph Shirokey, petitioner, is a classified civil service firefighter with the City of Cleveland Heights, Ohio. On June 23, 1984, Mr. Shirokey took a written examination for the position of Fire Lieutenant and finished sixth out of eighteen examinees. After additional points were awarded for seniority, efficiency and residency, Mr. Shirokey moved up to fourth on the eligibility list. This list was certified by the city's civil service commission on July 13, 1984. After the initial appointment Mr. Shirokey moved to third on the list.

In September of 1984, the fire chief notified the appointing authority that a vacancy existed in the fire department for the position of Lieutenant, a probationary position. On September 29, 1984, the civil service commission certified Mr. Shirokey, then third on the eligibility list, along with two other firefighters to the appointing authority, in accordance with Section 10(i), Rule IV of the Cleveland Heights Civil Service Commission. This rule is not an ordinance nor an express part of the city charter and directly conflicts with the state civil service statutes that requires the person in the highest position to be certified and appointed. A firefighter other than Mr. Shirokey was appointed after being recommended by the fire chief. On October 1, 1984, there existed another vacancy in the rank of Fire Lieutenant, and on October 2, 1984, the above process was repeated and Mr. Shirokey, now second on the list, along with two other firefighters standing first and third was certified to the appointing authority and a firefighter other than Mr. Shirokey was appointed, leaving Mr. Shirokey first on the list. On October 3, 1984, there existed a vacancy in the rank of Lieutenant,

and the above process was repeated. However, Mr. Shirokey, who was then highest on the list, was not certified because according to Section 10(i) Rule IV prohibited certification of a name more than twice except on the written request of the appointing authority.

This process continued and six more firefighters were appointed from the list until the list expired on July 13, 1985. However, Mr. Shirokey's name was never again certified to the appointing authority nor was he appointed to the position of Lieutenant.

B. Trial Court Proceedings

On August 1, 1985, Mr. Shirokey filed a complaint against various officials of the city. On August 2, 1985, Mr. Shirokey amended this complaint to include the city as a defendant. He pled, *inter alia*, that he was improperly passed over on the civil service promotion and such conduct was in violation of procedural and substantive due process under the Fourteenth Amendment of the United States Constitution and that he had a claim under 42 U.S.C. §1983.

Mr. Shirokey moved for partial summary judgment which was opposed and a cross-motion for summary judgment was filed. On October 28, 1988, the trial court denied respondent's cross-motion for summary judgment, but because the city civil service rules were invalid, granted Mr. Shirokey's partial motion for summary judgment on his 42 U.S.C. §1983 claim. All defendants except the city were voluntarily dismissed. The court concluded that he was entitled to be promoted as of October 29, 1984 and was awarded compensatory damages, reasonable litigation expenses and attorney fees.

C. Eighth District Court of Appeals

The city, respondent, filed an appeal citing eight assignments of errors. The court of appeals unanimously affirmed and held that the trial court was correct that the city civil service rule was invalid and has no legal effect, that the state statutes govern, and that Mr. Shirokey had a legitimate claim of entitlement to be promoted to the rank of Fire Lieutenant because of his rank on the promotional list. Also, the court of appeals held, that Mr. Shirokey was denied his property interest under color of law. The court stated that the respondent's argument that prior to bringing a claim under 42 U.S.C. §1983 that the petitioner was required to allege and prove inadequacy of state remedies, as required by *Parratt v. Taylor*, 451 U.S. 527 (1981), was without merit because the deprivation of the petitioner's property interest was the result of an established city procedure. *Shirokey v. Marth, et al.*, No. 57267/57412 (Eighth District Court of Appeals, unreported 1990).

D. Proceedings Before The Supreme Court of Ohio

The respondent filed a timely notice of appeal, in accordance with the Rules of Practice of the Supreme Court of Ohio. The motion to certify the record was allowed. The Ohio Supreme Court reversed the judgment of the court of appeals.

The Ohio Supreme Court in the Syllabus held,

> Section 1983, Title 42, U.S. Code and the substantive due process protections guaranteed by the Fourteenth Amendment do not provide a cognizable remedy to claimants who merely allege they have failed to receive a job promotion. *Shirokey v. Marth*, 63 Ohio St. 3d 113, 585 N.E.2d 407 (1992).

The court with respect to the procedural due process claim found, "[T]hat Shirokey's procedural due process rights were not violated since the state's judicial review and judicial processes allow for a full consideration of his claim." *Id.*, at 122, 585 N.E.2d 407, 414.

The court therefore held; "[T]hat his [petitioner's] complaint failed to state a claim under Section 1983 for a violation of his substantive or procedural due process." *Id.*, at 122, 585 N.E.2d 407, 414.

WHY THE WRIT SHOULD BE GRANTED

1. THE OHIO SUPREME COURT'S DECISION THAT THE PETITIONER SHIROKEY DID NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN A PROMOTION AS A PUBLIC EMPLOYEE IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

The Supreme Court of Ohio failed to articulate the standard that was used when they decided that the petitioner did not have a constitutionally protected interest in a promotion to afford him relief under 42 U.S.C. 1983.

The first step in analyzing a claim under 42 U.S.C. 1983 is to determine whether the deprivation occurred under "color of law."

As this Court has stated:

> "In any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt*, 451 U.S. at 535.

The City of Cleveland Heights has admitted that their acts would satisfy this requirement. *Shirokey*, at 116-117, 585 N.E.2d 407, 410.

The next step is to decide whether the conduct deprived the claimant of a property right. The Supreme Court of Ohio apparently bypassed this stage. While the court takes note that Petitioner Shirokey raised this issue as a proposition of law, and they state that this is the key issue, the court never undertakes a proper

analysis of whether the petitioner has a constitutionally protected property interest nor do they ever answer the question.

This Court has stated;

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> "Property interest, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

This Court has held that in order for a statute or regulation to create a constitutionally protected interest, "[i]t has [to use] language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed. . . . [Further,] that the repeated use of the explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). This Court also held that the specific substantive predicates are, "substantive limitations on official discretion." *Olim v. Wakinikona*, 461 U.S. 238, 249 (1982).

> "If the decisionmaker is not "required to base its decision on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all . . . [then] the State has not created a constitutionally protected liberty interest." (*See Id.* at 249.

Other courts have used this same rationale to conclude that in order to create a "legitimate claim of entitlement", in addition to procedural protection, "such a right attaches only when there are substantive restrictions on the employer's discretion." *Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1502 (10th Cir. 1984). *See also, Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983); *McGraw v. City of Huntington Beach*, 882 F.2d 385 (9th Cir. 1988).

Having determined that property interests are grounded in state laws that have mandatory terms of expression conferring a benefit and terms limiting the discretion of the decisionmaker, the next step is to analyze the laws that are claimed to possess these characteristic parameters. In this particular case, *both* the city's rules and the state civil service statutes should be scrutinized to determine whether they created a property interest as defined by the precedent of this Court.

In Ohio the Supreme Court has stated, "Only what is stated in a syllabus or in an opinion *per curiam* or by the court represents a pronouncement of law by this court." *State, ex rel. Canada v. Phillips*, 168 Ohio St. 191, Syllabus 6, 151 N.E.2d 722 (1958). Based upon a long series of precedent, therefore, applying the doctrine of *stare decisis*—which was recently discussed by the court in *Rocky River v. State Emp. Relation Bd.*, 43 Ohio St. 3d 1, 4-10, 539 N.E.2d 106, 106-111 (1989)—the Ohio Supreme Court "stated the general rule, that in the event of conflict between a charter provision and a state statute, the charter would prevail, but *only* where the conflict was by 'the express terms of the charter and not by mere inference.' " *State ex rel. Habe v. South Euclid*,

56 Ohio St. 3d 117, 118, 564 N.E.2d 483, 485 (1990). (Emphasis in the original, citation omitted.) The facts in *Habe* are identical to the petitioner's. An applicant for a position of police sergeant, who was ranked first on the promotional list, was not promoted because the city used a similar "one of three" rule. The rule, "while set forth in commission rules as authorized by the charter[,] . . . was not expressly set forth in South Euclid Charter. . . . [T]hus, the statutory standard was the applicable standard . . . [at] the time of the appointments." *See Id.* at 118, 564 N.E.2d 483, 485. The City of Cleveland Heights admits that the Section 10(i), Rule IV was never an ordinance, let alone expressed in the charter. *Shirokey*, at 116-117.[1]

Instead of properly analyzing the validity of the city's rule and whether the state civil service statutes created a property interest within the parameters set forth by the Court in *Roth*, *Hewitt*, and *Olim*, the Ohio Supreme Court either; equates a property interest with a " 'fundamental' interest protected by substantive due process . . ."; or, relies upon the fact that since the "city has conceded that acts or omission by the city officials in promulgating the city's 'one in three' rule and making promotions thereunder would satisfy the 'color of state law' requirement[.] . . . Therefore, [they conclude they] need only to review whether the 'one of three' rule deprived Shirokey of his 'rights, privileges or immunities secured by the Constitution or law of the

[1] The city has continually argued that it was a proper exercise of its "home rule" power for council to delegate to the civil service commission the responsibility to determine the procedure to determine merit and fitness in the classified service. The charter, however, specifically granted council the responsibility to pass a specific ordinance. Council did not. The Ohio Supreme Court has specifically rejected this argument in a long line of precedents, that has recently been reaffirmed in *Habe*.

United States.' " *Shirokey*, at 116-117, 585 N.E.2d 407, 410. (Citations omitted.) The court's decision fails to delineate this rationale used in reaching this conclusion. Further, the court is silent as to whether the state civil service statutes created a property interest. They were asked to clarify this in a motion for rehearing, but the motion was denied.

It would appear that the Ohio Supreme Court considered the city's rule to be invalid (from their own precedent an invalid rule cannot be used by a city in the civil service promotional process). They then refused or failed to apply the statutory standard and consider the petitioner's claim that the state civil service statutes created a cognizable property interest and therefore, a legitimate claim of entitlement sufficient to seek a remedy under 42 U.S.C. §1983. The court ceases its analysis without completely analyzing all the potential property interests. It is clear, under these circumstances that the petitioner has a legitimate claim of entitlement to his promotion which is grounded in the Ohio State civil service statutes, Ohio Revised Code 124.45 through 124.49.

These statutes specifically state that he should have been appointed to the fourth vacancy. If during his probationary period his service is not satisfactory then he shall: (1) be reduced in rank; (2) be given written notice and a detailed statement outlining the deficiencies; and, (3) be given an opportunity to appeal to determine the sufficiency of the cause of the demotion. Ohio Rev. Code 124.45 through 124.49. Taken as a whole, *in para materia*, these statutes created a legitimate claim of entitlement sufficient to sustain a claim under 42 U.S.C. §1983.

Implicitly, therefore, he is entitled to predeprivation notice and hearing. This Court has held that once a property interest in public employment is conferred, the deprivation of such interest may not occur without appropriate constitutionally guaranteed safeguards. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).[2] Both the trial court and the court of appeals held that the City of Cleveland Heights rule was invalid and its use deprived Mr. Shirokey of his entitlement under state civil service statutes.

Additionally, Mr. Shirokey has a protected property interest in his position on the eligibility list and being certified to the appointing authority as being "[t]he person highest on such list." Ohio Rev. Code Ann. §124.48 (Baldwin 1987). While his name was not removed from the list, he was not eligible to be certified to the appointing authority when his name appeared first on the list by operation of §10(i) Rule IV, without notice or hearing. The court in *Stana v. School District of Pittsburgh*, 775 F.2d 122 (1985), stated that:

> ". . . retention on the eligibility list, which is the *sine quo non* for her placement in a teaching position with the Pittsburgh School District, implicated a Constitutional 'property' interest created by State law." *Id.* at 125.

Stana was a certified teacher who was currently teaching at a private parochial school and was seeking a better position. The successful appointee to that position must first serve a two year probationary period before being

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[2] This Court held that a similar Ohio statute, O.R.C. 124.34, afforded an Ohio public employee pre-termination process when he could only be discharged for cause.

offered tenure and a permanent contract. 24 Pa. Stat. Ann. 24 §11-1121 (Purdon 1962) (*See*, Appendix A59 to A60). *Stana* is analogous to the case at bar. The court in *Stana* held that the plaintiff had a valid property interest in having his name on the promotional list and that before the name being removed the plaintiff was entitled to notice and a hearing.

Since the decision of the Ohio Supreme Court in this case does not comply with the precedents of the United States Supreme Court this Court is being asked to review this decision.

2. THE OHIO SUPREME COURT'S DECISION THAT THE PETITIONER'S COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER 42 U.S.C. §1983 FOR THE VIOLATION OF HIS PROCEDURAL DUE PROCESS RIGHTS IS CONTRARY TO THE PRECEDENT OF THE UNITED STATES SUPREME COURT.

The Ohio Supreme Court's decision, that a plaintiff who asserts a claim under 42 U.S.C. §1983 for the deprivation of purely economic interests without due process of law has the initial burden to allege and prove the inadequacy of state remedies, fails to recognize the United States Supreme Court's own analysis and restriction of its opinion in *Parratt*, and its progeny, in *Zinermon v. Burch*, 494 U.S. 113 (1990). "[This] Court usually has held that the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property." *Zinermon*, 494 U.S. at 127.

This Court further stated, however, that in some circumstances a statutory provision for postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies procedural due process. For example, where quick action would be needed, *see Id.*, at 128; or, where a State cannot predict when a State employee will act in a random and unauthorized manner instead of following an established procedure. Thus, the question of the availability and adequacy of the state remedy is crucial in answering the query of what process is required in order to satisfy procedural due process. *Parratt*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1983); *See also, 1946 St. Clair Corp. v. Cleveland*, 49

Ohio St. 3d 33, 550 N.E.2d 456 (1990).[3] This Court recognized that *Parratt* and its progeny, was an application of the test that was enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "to the *unusual* case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue." *Zinermon*, 494 U.S. at 129. (Emphasis added.) Thus, in *Parratt*, *Hudson*, and *1946 St. Clair Corp.*, unlike the facts of the instant case, the state employees' acts were random and unauthorized and against the established procedure. Therefore, the State was unable to predict the actions of the recalcitrant employee and furnish predeprivation notice and hearing. This Court, therefore concluded, that since the State could not predict or foresee precisely when the loss would occur (therefore, was unable to provide predeprivation due process) that postdeprivation state remedies would satisfy due process. *Parratt*, 451 U.S. at 541.

But, this Court has specifically distinguished *Parratt* (a distinction totally ignored by the Ohio Supreme Court), that the availability of postdeprivation tort remedy does not satisfy due process, when the "'*established state procedure*' ... destroys his entitlement without according him proper procedural safeguards." *Logan v. Zimmermann Brush Co.*, 455 U.S. 422, 436 (1981). (Emphasis added.) This Court reaffirmed this holding and noted that "*Parratt* ... 'was not

[3] *Parratt* involved a state correctional officer who negligently destroyed a prisoner's hobby kit as the result of not following the established procedure. In *Hudson*, the claim was that a correction officer intentionally destroyed a prisoner's personal property in violation of established procedure. *1946 St. Clair*, involved a police officer illegally towing legally parked cars. The common denominator is that all of the cases involved a state employee in violation of the established procedure.

designed to reach . . . a situation' where the deprivation is the result of an established state procedure." *Hudson*, 486 U.S. at 532-533, n.13. (Citation omitted.) The Ohio Supreme Court, however, applies the *Parratt* rule even to those cases, such as the instant case, where the loss that occurred was totally foreseeable and predictable by the city through its established procedure. The court misses the point when it states:

> "In this case, Shirokey's claim that he was denied a promotion and compensation as the result of the city's following a rule that had not been properly adopted does not lend itself to traditional predeprivation remedies. The very nature of the property loss here makes it impossible for the city to predict such deprivation and provide a predeprivation process." *Shirokey*, 120-121, 585 N.E.2d 407, 413 (1992).

The city and its officials, (1) are presumed to know the laws of the state of Ohio as are all citizens. (2) They are charged with following the laws of the United States, State of Ohio, and their charter. (3) They drafted the rule and have used it since 1936. (*See* Affidavit of Julian M. Suso, Appendix pp. A61 to A62). (4) They have the continuing responsibility to assure that their charter, ordinances, rules and regulations comply with the laws of the United States and State of Ohio. (5) Since they drafted the rule, they are on constructive notice that it conflicts with the state civil service statutes. (6) They knew and admitted that the rule was not express in their charter. (*See* "Defendant's Answers to Plaintiff's Request for Admissions" (Appendix pp. A63 to A68). (7) Therefore, they are on constructive notice that the rule is invalid. (8) They knew that if any civil service rule was invalid, the state civil service statutes would take precedent. (9) By their action, they, as appointing authority, knew that they were not going to promote Mr.

Shirokey. (10) Therefore, they are on constructive notice and *the loss was foreseeable and predictable.* (11) Therefore, predeprivation due process is required. To hold otherwise would allow all municipalities that enforce invalid or unlawful rules to be absolved of liability, and allow the city the defense of ignorance of the law. The quintessential purpose of 42 U.S.C. 1983 is to protect persons against such wrongdoing. As this Court stated in *Monroe v. Pape,* 365 U.S. 167 (1961), "The *first* purpose of this bill prohibits an 'invidious legislation' by States against the rights and privileges of citizens of the United States." *See Id.* at 173 (Where the Court discusses the debates in Forty-Second Congress.) This Court has also held that cities can be held liable under 42 U.S.C. 1983, but only if the "action pursuant to official policy of some nature caused a constitutional tort." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978). This Court later stated that:

> "The 'official policy' requirement was intended to distinguish acts of the *municipality* from the acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. Cincinnati,* 475 U.S. 469, 479-480 (1985). (Emphasis in the original.)

This Court continued:

> "We hold that municipality liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the officials or official responsible for establishing final policy with respect to the subject matter in question." *Id.* 483-484.

"Therefore, a complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite." *Wilson v. Civil Town of Clayton,*

Ind., 839 F.2d 375, 380 (7th Cir. 1988). Accordingly, since the loss is predictable and occurred as the result of an established city procedure, predeprivation due process is required. The city has admitted using this rule since 1936, and that it was neither expressed nor enacted as a part of their charter. In order for the city to give a predeprivation due process it only had to follow the law of the state.

When the civil service statutes are read as a whole, *in pari materia*, it is obvious that the Ohio State Legislature never envisioned the need of any procedural due process guarantee into the appointing process, because the certification and appointment were mandatory when a candidate's name appeared first on the list. Ohio Rev. Code Ann. 124.48 (Baldwin 1987). But, they did see the need for procedural due process in the total promotion procedure. They saw that the probationary period was an integral part of the selection process to determine whether the candidate qualified for the promotion. As such, in order for a candidate to acquire permanent status in his promoted rank, he had to successfully complete his probationary period. If he was unsuccessful in the probationary period, he would be subject to demotion to his former rank. In order to preserve the integrity of the civil service procedure for a firefighter, the legislature created a procedural due process guarantee in Ohio Revised Code R.C. 124.49. Ohio Rev. Code Ann. 124.49 (Baldwin 1987). This statute contains the basic elements of procedural due process, notice and hearing in order to determine the "sufficiency of the cause of the demotion." *Id.* To this process this Court has required predeprivation notice and a rudimentary hearing. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1984).

Therefore, when the city supplanted its invalid rule,[4] as an official act, for the valid state civil service statutes, they denied Mr. Shirokey his promotion without procedural due process.

Accordingly, this decision of the Ohio Supreme Court is contrary to the precedent of this Court and this is why this decision should be reviewed by this Court.

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[4] An identical "one of three" rule that was not an expressed part of the charter was held to be invalid based upon a long series of precedents in *State, ex rel. Habe v. South Euclid*, 56 Ohio St. 3d 117 (1990). It should be noted that a rule of a municipality's civil service commission need only be passed by the majority of the commission, and may be subject to change at any time. An ordinance, however, is passed by the majority of city council, and can only be repealed by another ordinance. However, a city charter provision needs to be voted on and passed by the majority of the voters, and may only be removed by a similar election process.

3. THE OHIO SUPREME COURT'S DECISION IN THIS CASE IS CONTRARY TO THE LAWS OF THE UNITED STATES AND THE PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES SO AS TO HAVE AN ADVERSE AND CHILLING EFFECT UPON THE RIGHTS OF UNITED STATES CITIZENS WHO HAVE A LEGITIMATE CLAIM AND ATTEMPT TO BRING AN ACTION UNDER 42 U.S.C.§ 1983 IN OHIO.

This decision substantially impairs and adversely impacts upon the rights of all citizens of the United States who may have a claim under 42 U.S.C. §1983 in Ohio. The court imposes the *Parratt* rule to all deprivation of a property interest "when the interest is purely economic." *Shirokey*, at 120. This occurs regardless of whether the loss was foreseeable or not, or whether the loss occurred as the result of an established state procedure. This expansion is thoroughly contrary to the precedent and rationale of this Court.

To this end people who are similarly situated as *Logan* and *Loudermill* would have no cognizable claim under the decision and would be denied access to their remedy under 42 U.S.C. §1983. Therefore, there is a need for this Court to review this decision.

CONCLUSION

A writ of certiorari should issue to review the decision and order of the Supreme Court of Ohio for the following reasons:

(1) The Ohio Supreme Court never considered that since the city's rule was unlawful, therefore, incapable of creating a property interest as defined by the precedent of this Court, that the Ohio civil service statutes created the requisite property interest in order to support a claim under 42 U.S.C. 1983.

(2) That when the city utilized, as its established procedure, the invalid city civil service rule in the promotional process it denied the petitioner his promotion and due process guarantees that were created under state statutes.

(3) The loss was entirely predictable since the city is not above the law. The city had constructive knowledge of the status of the laws of the state and the country. The city knew that the rule which it utilized was against the state civil service statutes. This rule was and is the established procedure of the city. As such the city made the conscious decision to utilize the rule.

(4) This Court should review this decision since it is against the precedent of this Court in that it requires a claimant to allege and prove inadequacy of state remedies when the loss occurred as the result of an established procedure, essentially stating the postdeprivation remedies will satisfy procedural due process. This Court has stated often that under these circumstances postdeprivation remedies will not satisfy due process—predeprivation procedural due process is required.

(5) That this decision has an adverse impact upon the citizens of the United States who attempt to bring a claim in Ohio under 42 U.S.C. §1983 when they sustain a loss as the result of an established procedure.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 26, 1992)

No. 90-1760

THE SUPREME COURT OF OHIO

JOSEPH SHIROKEY,
Appellee,

v.

ROBERT MARTH, *et al;*
CITY OF CLEVELAND HEIGHTS,
Appellants.

[Cite as *Shirokey v. Marth* (1992),
63 Ohio St. 3d 113.]

Civil rights—Section 1983, Title 42, U.S. Code and due process protections guaranteed by Fourteenth Amendment do not provide a cognizable remedy to claimants who merely allege they failed to receive a job promotion.

Section 1983, Title 42, U.S. Code and the substantive due process protections guaranteed by the Fourteenth Amendment do not provide a cognizable remedy to claimants who merely allege they have failed to receive a job promotion.

(No. 90-1760—Submitted October 16, 1991—
Decided February 26, 1992.)

APPEAL from the Court of Appeals for
Cuyahoga County, Nos. 57267 and 57412.

Joseph Shirokey, plaintiff-appellee, is a classified civil service firefighter with the city of Cleveland Heights, Ohio. On June 23, 1984, Shirokey took a written examination for the position of Fire Lieutenant and finished sixth out of eighteen exam applicants. After additional points were awarded for seniority, efficiency and residency, Shirokey moved up to fourth on the eligibility list, which was certified by the city's civil service commission on July 13, 1984. The parties have indicated that, after an initial appointment from the list, Shirokey moved to third on the list.

In September 1984, the city's Fire Chief, Robert Marth, notified the City Manager, Richard V. Robinson, the appointing authority, that a vacancy existed in the Division of Fire for the position of Lieutenant. On September 29, 1984, the civil service commission certified Shirokey along with two other firefighters, then standing highest on the eligibility list, to Robinson, in accordance with Section 10(i), Rule IV of the Cleveland Heights Civil Service Commission (the "one of three" rule). However, a firefighter other than Shirokey was appointed[1] to fill the existing vacancy after being

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[1] Section 10(i), Rule IV of the Cleveland Heights Civil Service Commission requires the following procedure to fill vacancies:

"When an examination for promotion in the Divisions of Police and Fire has been completed and upon receipt of notice from the Appointing Authority that a vacancy exists in a particular rank, the Commission shall certify to such Appointing Authority, the three names graded highest on the appropriate eligible list. Such Appointing Authority shall thereupon appoint one of the three so certified to fill the office. In case there is more than one vacancy to be filled, additional names shall be certified, so that at least twice more eligibles than positions to be filled shall be certified. If there are less than three names on an eligible list because less than three candidates were eligible for, or did not compete for [*sic*], or did not

(Footnote continued on following page.)

recommended by Marth. Again on October 1, 1984, there existed a vacancy in the rank of Lieutenant and on October 2, 1984, a request for a certification of names was made by Robinson in accordance with the civil service commission rule. Consequently, Shirokey, along with two other firefighters then standing highest on the eligibility list, was certified to Robinson, and on October 3, 1984 a firefighter other than Shirokey was appointed to fill the vacancy. The civil service commission records show no further written requests by Robinson to certify Shirokey for a third time. The "one of three" rule prohibited certification of a name more than twice except on the written request of the appointing authority. Therefore, Shirokey was never again certified for promotion. Subsequently, pursuant to Section 3, Rule V of the Cleveland Heights Civil Service Commission, the eligibility list established on July 13, 1984 expired on July 13, 1985, after several additional appointments were made from the list.

On August 1, 1985, Shirokey filed a complaint against various officials of the city in their individual and official capacities, including Chief Marth, Robert Downey (City Manager), Marcia Nolan (Assistant City Manager) and Donald Barclay (City Law Director). On August 2, 1985, Shirokey amended his complaint to include the city as a defendant. Shirokey pled, *inter alia*, that he had been improperly passed over on the civil

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(Footnote continued from preceding page.)

pass [*sic*] an examination for promotion, then the Commission shall certify the names or name comprising the respective list for appointment, and the Appointing Authority shall appoint one of the two candidates, or the candidate on the list, to fill any such vacancy existing. No name shall be certified more than twice to the same Appointing Authority for promotion from an eligibility list, except on the written request of such Authority."

service promotion eligibility list for the position of Fire Lieutenant and that Marth had committed three separate acts of defamation. The allegations also included claims for breach of contract, intentional and negligent infliction of emotional distress, and violations of Shirokey's constitutional due process rights pursuant to Section 1983, Title 42, U.S. Code.

On January 3, 1986, the defendants moved for summary judgment. Subsequently, Shirokey filed a second amended complaint adding as defendants three members of the city's civil service commission and the commission's legal counsel. The trial court denied the city's motion on May 28, 1986. Shirokey then filed a motion for partial summary judgment on June 28, 1988 covering only his Section 1983 claims. He claimed that the "one of three" rule had not been properly adopted, and that state law therefore applied. He claimed that under R.C. 124.46 and 124.48 he was entitled to promotion. In the motion Shirokey requested a permanent injunction to promote him with back pay and seniority in the higher rank, as well as payment of his attorney fees. Thereafter, the defendants opposed Shirokey's motion for summary judgment and filed a cross-motion for summary judgment on all claims against them.[2]

On October 28, 1988, the trial court denied the defendants' cross-motion for summary judgment, but granted Shirokey's partial motion for summary judgment. The court concluded that Shirokey was entitled to be appointed to the rank of Lieutenant (with seniority) as of October 29, 1984. Therefore, he was

[2] During the course of this action Shirokey voluntarily dismissed all defendants other than the city and all counts except for the Section 1983 claims.

awarded compensatory damages in the amount of $15,309.18 plus $6,687.62 (later reduced to $3,513.09) in interest. Moreover, the court awarded Shirokey his reasonable litigation expenses in the amount of $2,233.88 and attorney fees of $41,500. The court further held that punitive damages were inappropriate.

The court of appeals affirmed the trial court and held that Shirokey had a legitimate claim of entitlement to be promoted to the rank of Fire Lieutenant because of his position on the promotional list. Consequently, the court held, he had been denied his property interest under color of state law.

This cause is now before the court pursuant to the allowance of a motion to certify the record.

Mary E. Papcke and *John M. Bostwick, Jr.* for appellee.

John H. Gibbon, Law Director, and *E. Todd Hunt*, for appellant.

Calfee, Halter & Griswold, *John E. Gotherman* and *Stanley J. Dobrowski*, urging reversal for *amicus curiae*, Ohio Municipal League.

HOLMES, *J.* The key issue in this case is whether Section 1983, Title 42, U.S.Code affords Shirokey a property interest in being promoted to the position of Fire Lieutenant in the city of Cleveland Heights. For the reasons that follow, we answer such query in the negative.

For purposes of our discussion, we shall focus on paragraph thirty-five of Shirokey's second amended complaint, which asserts:

"Defendants infringed on the liberty and property interests of Plaintiff Shirokey when they arbitrarily denied him his position. [S]aid arbitrary, malicious and capricious conduct by the Defendants constituted a violation of procedural and substantial [*sic*] due process under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983."[3]

Section 1983[4] provides a remedy to persons whose federal rights have been violated by governmental officials. *Monroe v. Pape* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, overruled on other grounds in *Monnell v. Dept. of Social Services of City of New York,*

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[3] In Shirokey's second and third propositions of law he defines his claim by stating:

"A person who, according to R.C. 124.45, 124.46, 124.48, and 124.49, has a right to a promotion has established a legitimate claim of entitlement to that promotion in order to have a constitutionally protected property interest cognizable under 42 U.S.C. §1983."

"A charter municipality in Ohio is subject to liability under 42 U.S.C. §1983 when, by the adoption and exercise of civil service rules and regulations which are in direct conflict with the state civil service statutes and are not expressly set forth in the charter as required by the laws of the state, it deprives a civil service employee of a promotion to which he had a valid entitlement to [*sic*] under state civil service statutes."

[4] The Civil Rights Act of 1871 as amended, Section 1983, Title 42, U.S.Code provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ***"

(1978), 436 U.S. 648, 98 S.Ct. 2018, 56 L.Ed.2d 611. However, "Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac* (C.A.6, 1990), 906 F.2d 220, 223. Moreover, Section 1983 does not cover official conduct that violates only state law. Rather, the statute is limited to deprivations of federal statutory and constitutional rights. *Huron Valley Hosp., Inc. v. City of Pontiac* (C.A.6, 1989), 887 F.2d 710, 714; *Baker v. McCollan* (1979), 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433, 442.

This court, in *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, 550 N.E.2d 456, 459, set forth the requisite elements of a Section 1983 claim, as follows:

"*** To establish such a claim, two elements are required:

"(1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. ***" See, also, *Parratt v. Taylor* (1981), 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420, 428.

The city has conceded that acts or omissions by the city officials in promulgating the city's "one of three" rule and making promotions thereunder would satisfy the "color of state law" requirement of *1946 St. Clair Corp., supra*. Therefore, we need only review whether the "one of three" rule deprived Shirokey of his "rights, privileges or immunities secured by the Constitution or laws of the United States."

The United States Court of Appeals, Sixth Circuit, in *Charles v. Baesler* (C.A. 1990), 910 F.2d 1349, reviewed a case similar to the one at bar where the issue concerned whether the claimant was denied substantive, as opposed to procedural, due process. In *Charles,* the plaintiff successfully completed a fire department examination in January 1981, and was placed fifth on the promotion list for the rank of major. *Id.* at 1350. The list containing plaintiff's name expired in January 1983 without the plaintiff having been selected for promotion, although an opening did exist in May 1984. *Id.* Plaintiff premised his claim on the fact that the government's personnel director failed to promote him based on the expired promotion list. *Id.* Since plaintiff topped the expired eligibility list and a new list had not been created, he believed he should have been selected for the vacancy. *Id.* at 1351. The *Charles* court noted with respect to the plaintiff's contract that:

"*** Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. The substantive Due Process Clause is not concerned with the garden variety issues of common law contract. Its concerns are far narrower, but at the same time, far more important. Substantive due process 'affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' *Michael H. v. Gerald D.*, [491] U.S. [110, 122], 109 S.Ct. 2333, 2341, 105 L.Ed.2d 91 [105] (1989) (plurality opinion) quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L.Ed. 674 [677] (1934) (Cardozo, J.), *overruled on other grounds, Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).***.

State-created rights such as Charles' contractual right to promotion do not rise to the level of 'fundamental' interests protected by substantive due process. Routine state-created contractual rights are not 'deeply rooted in this Nation's history and tradition,' and, although important, are not so vital that 'neither liberty nor justice would exist if [they] were sacrificed.' *Bowers v. Hardwick* (1986), 478 U.S. 186, 191-94, 106 S.Ct. 2841, 2844-46, 92 L.Ed.2d 140 [146-48] (1986) ***." *Charles, supra*, at 1353, see, also, *Ramsey v. Bd. of Edn. of Whitley Cty., Kentucky* (C.A. 6, 1988), 844 F.2d 1268, 1274-1275 ("an interference with a property interest in a pure benefit of employment, as opposed to an interest in the tenured nature of the employment itself, is an interest that can be and should be redressed by a state breach of contract action and not by a federal action under Section 1983").

As the Sixth Circuit properly observed in *Charles, supra*, at 1355:

"*** 'an employee deprived of a property interest in a specific benefit, term, or condition of employment, suffers a loss which is defined easily . . . and therefore, any interference with that interest is redressed adequately in a state breach of contract action.' [*Ramsey v. Bd. of Edn. of Whitley Cty., Kentucky* (C.A.6, 1988), 844 F.2d 1268], at 1274. In contrast, a person unreasonably deprived of her fundamental liberty to marry, for instance, may suffer a more undefinable loss of physical, emotional, psychological, social and economic autonomy not readily redressed at common law. ***"

The facts in *Charles, supra*, provide an illustration of an employee who was merely deprived of a specific benefit, term or condition of employment. The *Charles* court correctly noted that Charles's loss was easily

compensable by calculating the difference between a captain's salary and a major's salary over the relevant period of time. And the vehicle for recovering his lost compensation could be a state breach of contract action. *Id.*

We explicitly stated in *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, 199-200, 513 N.E.2d 288, 297, that:

"*** Where the right asserted is a constitutional right, federal courts have accorded different treatment, under Section 1983, to different rights. Where the right deprived under color of state law is a substantive right—for example, the First Amendment guarantee of free speech or the Fourth Amendment prohibition against unreasonable searches—a Section 1983 suit is always available regardless of supplemental state remedies. *** [Citations omitted.] Where, however, the claim asserted rests on the deprivation of a property interest alone, the constitutional right invoked is the *procedural* due process right to notice and hearing. *** [Citations omitted.] The constitutional infringement under the Fourteenth Amendment is not *** the deprivation of a property interest *per se*, but is instead the *manner* by which the property is taken. ***" (Emphasis *sic.*)

Therefore, we hold that Section 1983 and the substantive due process protections guaranteed by the Fourteenth Amendment do not provide a remedy to claimants who merely allege they have failed to receive a job promotion. As the United States Court of Appeals, Seventh Circuit, observed: "the Constitution must not be trivialized by being dragged into every personnel dispute in state and local government. Disputes over overtime, over work assignments, over lunch and coffee breaks do

not implicate the great objects of the Fourteenth Amendment." *Brown v. Brienan* (C.A.7, 1983), 722 F.2d 360, 365. Accordingly, for the foregoing reasons, we find that the present dispute over Shirokey's alleged right to a job promotion, like the dispute in *Charles, supra*, "does not involve an interest of sufficient weight to merit the protection of the substantive Due Process Clause," *Charles, supra*, at 1356.[5] Consequently, we are left to address Shirokey's remaining claim concerning the alleged violation of his procedural due process rights.

In *Zinermon v. Burch* (1990), 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100, 114, the United States Supreme Court discussed the requirements placed on a claimant alleging a procedural due process violation,[6] by stating:

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[5] We emphasized in *1946 St. Clair Corp., supra*, 49 Ohio St.3d at 36, 550 N.E.2d at 460, that:

"Property interests are distinguished from life or liberty interests because property interests are founded on the procedural aspects of due process; they are not substantive rights created by the federal Constitution. *Cooperman* [*v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191] at 200, 513 N.E.2d [288] at 297-298. Property interests '*** are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' *** (*Regents v. Roth* [(1972), 408 U.S. 564] at 577 [92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561]."

[6] In *Zinermon* the Supreme Court commented that Section 1983 claims could be brought for one of three different violations of the Due Process Clause of the Fourteenth Amendment.

"*** First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under §1983 for state officials' violation of his rights to, *e.g.*, freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component

(Footnote continued on following page.)

"*** A §1983 action may be brought for a violation of procedural due process, but here the existence of state remedies *is* relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law. Parratt* [*v. Taylor* 1981)], 451 U.S. [527], at 537, 101 S.Ct. at 1913, 68 L.Ed.2d 420 [428]; *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 [262] (1978) ('Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property'). The constitutional violation actionable under §1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. ***" (Footnotes omitted and emphasis *sic.*) See, also, *Hudson v. Palmer* (1984), 468 U.S. 517, 533, 104 S.Ct. 3194, 3204, 82 L.Ed.2d 393, 407-408 ("an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the

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that bars certain arbitrary, wrongful government actions ***. As to these two types of claims, the constitutional violation actionable under §1983 is complete when the wrongful action is taken.

"The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. ***" 494 U.S. at 125, 110 S.Ct. at 983, 108 L.Ed.2d at 113-114.

In the present case we are dealing only with the second and third possible violations, encompassing substantive and procedural due process protections.

procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy").

In *Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33, the United States Supreme Court set forth a three-part test for courts to use to determine what procedural protections the Constitution requires in a particular case. Specifically, courts should weigh the following: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure requirements would entail."

We held in *1946 St. Clair Corp., supra*, that "[w]hen the interest is purely economic, the Constitution demands only that the challenging party be given a meaningful opportunity to be heard. *Parratt* [*v. Taylor* (1981), 451 U.S. 527,] at 543-544 [101 S.Ct. at 1916-1917, 68 L.Ed.2d at 433-434]. If the state provides adequate post-deprivation state tort remedies for unauthorized intentional property deprivations, the state has provided all the 'process' required under the Fourteenth Amendment." *Id.*, 49 Ohio St.3d at 36, 550 N.Ed.2d at 460. Furthermore, we placed the initial burden on a plaintiff who asserts a claim under Section 1983 for the

deprivation of purely economic interests without due process of law that he allege and prove the inadequacy of state remedies. *Id.* at syllabus.

This view is in accordance with *Parratt, supra*, where the Supreme Court held that a plaintiff is required to prove inadequate state remedies where, due to the nature of the deprivation, the state could not be expected to provide predeprivation process. 451 U.S. at 540-541, 101 S.Ct. at 1915-1916, 68 L.Ed.2d at 432. Therefore, given the nature of the deprivation, if the state cannot be expected to provide predeprivation process, there is no constitutional violation as long as the state provides adequate postdeprivation remedies.

In this case, Shirokey's claim that he was denied a promotion and compensation as the result of the city's following a rule that had not been properly adopted does not lend itself to traditional predeprivation remedies. The very nature of the property loss here makes it impossible for the city to predict such deprivations and provide a predeprivation process. See *Parratt, supra*, 451 U.S. at 541, 101 S.Ct. at 1916, 68 L.Ed.2d at 432. However, Shirokey did have the benefit of postdeprivation statutory and common-law remedies which would satisfy due process requirements. See *Zinermon, supra*, 494 U.S. at 127, 110 S.Ct. at 984, 108 L.Ed.2d at 115; *1946 St. Clair Corp., supra*, 49 Ohio St.3d at 34-35, 550 N.E.2d at 459. Specifically, Shirokey could have brought a declaratory judgment action[7] in order to determine his

[7] R.C. 2721.03 provides:

"Any person interested under a deed, will, written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, contract, or franchise, may have determined any questions of construction or validity arising under such instrument, constitutional provision, statute, rule, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

rights to the promotion under the city's civil service rules and charter. Also, he could have filed a request for an investigation and hearing with the civil service commission pursuant to Cleveland Heights Codified Ordinance 137.18, which provides:

"The civil service [*sic*] shall further have the power to make investigations concerning all matters touching endorsement and effect of the provisions of this chapter and of the rules of the Civil Service Commission prescribed thereunder; and, in the course of any such investigation or at any trial on appeal, the presiding officer of the Commission shall have the power to subpoena and require the attendance and testimony of witnesses, the power to administer oaths and affirmation and to take testimony relative to any such investigation or hearing, and the power to require the production by subpoena of any books, papers, public records or other documentary evidence pertinent to such investigation, inquiries or hearing."

Furthermore, as noted in our previous discussion concerning substantive due process, Shirokey had the common-law remedy of breach of contract available to him.[8] Finally, among the various options available to

[8] In a case similar to the one at bar, the United States Court of Appeals, Sixth Circuit, addressed the constructive discharge of an assistant fire chief who was not provided a postdeprivation hearing required under R.C. 124.34. *Meyers v. City of Cincinnati* (C.A.6, 1991), 934 F.2d 726. The *Meyers* court held with respect to the plaintiff's procedural due process rights:

"*** It is true that the municipal civil service commission refused to allow plaintiff to be heard because it interpreted the plaintiff's retirement as voluntary, but this refusal does not constitute a due process violation because an adequate state corrective judicial process exists. As we explained in *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 469 U.S. 834, 105

(Footnote continued on following page.)

Shirokey was a petition for a writ of mandamus claiming he had no adequate remedy in the ordinary course of law to protect his interest in the job promotion. See *State, ex rel. Zupancic, v. Limbach* (1991), 58 Ohio St.3d 130, 131-134, 568 N.E.2d 1206, 1207-1210.

Thus, in reviewing the available state law remedies, we find that Shirokey's procedural due process rights were not violated since the state's judicial review and administrative processes allow for a full consideration of his claim.

Accordingly, we express no view on the ultimate merits of Shirokey's claim except to hold that his complaint failed to state a claim under Section 1983 for the violation of his substantive or procedural due process rights.

Therefore, for the foregoing reasons, the judgment of the court of appeals is reversed.

Judgment reversed.

(Footnote continued from preceding page.)

S.Ct. 125, 83 L.Ed.2d 67 (1984): 'In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong.' *Id.* at 1066. The plaintiff here has attacked the municipal administrative hearing process, but he has not attacked the state's judicial process for the correction of errors by administrative agencies. In fact the state's judicial review process allows full review of such administrative decisions. *Kinney v. Ohio State Dept. of Admin. Serv.*, 14 Ohio App.3d 33 [14 OBR 37], 469 N.E.2d 1007 (1984), is a case in point. That court found invalid a forced retirement and reversed the action of the court of common pleas which had sustained the civil service commission. It is clear from *Kinney* that the state has a complete judicial corrective process fully adequate to review the plaintiff's claims. Therefore, the plaintiff has not shown a procedural due process violation." (Footnote omitted.) *Id.* at 731.

MOYER, *C.J.*, WRIGHT, and H. BROWN, *JJ.*, concur.

SWEENEY, DOUGLAS and RESNICK, *JJ.*, dissent.

SWEENEY, *J.*, dissenting. The majority's treatment of the issues in this case is not as facile as the syllabus and opinion otherwise make it appear. Under the guise of reviewing the merits of plaintiff's claims, the majority overwhelms the reader with numerous citations. However, few, if any, of these cases are germane to the instant claim for relief. In my view, plaintiff has clearly alleged a cause of action cognizable under Section 1983, Title 42, U.S.Code.

The majority raises the full panoply of state law remedies that plaintiff could have raised, and concludes that plaintiff's "procedural due process rights were not violated since the state's judicial review and administrative processes allow for a full consideration of his claim." By blithely dismissing plaintiff's cause of action in such a manner, the majority has essentially overruled, *sub silentio*, this court's very recent opinion in *Gibney v. Toledo Bd. of Edn.* (1988), 40 Ohio St.3d 152, 532 N.E.2d 1300, where this court held in the syllabus: "Exhaustion of state administrative remedies is not required prior to obtaining relief pursuant to Section 1983, Title 42, U.S.Code in state court. (*Felder v. Casey* [1988], 487 U.S. 131, 101 L.Ed. 123, 103 S.Ct. 2302, followed.)" By its holding today, the majority has added confusion to an area of law that had appeared to be settled.

In my view, the courts below were correct in finding that plaintiff was deprived of a property interest because R.C. 124.45 through 124.48 accord plaintiff a legitimate claim of entitlement to be promoted based on (1) his rank on the promotional list, and (2) the number of vacancies

that did in fact occur in the fire lieutenant position during the one-year period plaintiff's name appeared on the promotional list. By using the "one of three" rule in plaintiff's situation, the city of Cleveland Heights violated its own charter, and thereby deprived plaintiff of a legitimate claim of entitlement to a promotion to fire lieutenant.

If Section 1983 is not a proper remedy in a case such as the cause *sub judice*, one wonders what type of factual scenario is now necessary in order to raise such a claim given the majority's ill-conceived opinion today.

For these reasons, I would affirm the decision of the court of appeals below.

DOUGLAS and RESNICK, *JJ.*, concur in the foregoing dissenting opinion.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated February 26, 1992)

Case No. 90-1760

THE SUPREME COURT OF OHIO

JOSEPH SHIROKEY,
Appellee,

v.

ROBERT MARTH, *et al.*;
CITY OF CLEVELAND HEIGHTS,
Appellants.

JUDGMENT ENTRY

Appeal From The Court of Appeals

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed consistent with the opinion rendered herein.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

(Court of Appeals Nos. 57267 and 57412)

/s/ THOMAS J. MOYER
Chief Justice

MANDATE OF THE SUPREME COURT OF OHIO

(Dated February 26, 1992)

Case No. 90-1760

JOSEPH SHIROKEY,
Appellee,

v.

ROBERT MARTH, et al.;
CITY OF CLEVELAND HEIGHTS,
Appellants.

MANDATE

To the Honorable Court of Common Pleas

Within and for the County of Cuyahoga, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is reversed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $40.00, paid by Walter, Haverfield, Buescher & Chockley.

(Court of Appeals No. 57267)

/s/ THOMAS J. MOYER
Chief Justice

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEAL EIGHTH DISTRICT, CUYAHOGA COUNTY, OHIO

(Dated July 19, 1990)

NOS. 57267/57412

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

JOSEPH SHIROKEY,
Plaintiff-Appellee,

vs.

ROBERT MARTH, *et al.*,
Defendants-Appellants.

JOURNAL ENTRY AND OPINION

Civil appeal from Court of Common Pleas, Case No. 95478.

JUDGMENT AFFIRMED.

APPEARANCES:

For plaintiff-appellee:

MARY E. PAPCKE
JOHN M. BOSTWICK, JR.
Attorneys at Law
13317 Madison Avenue
Lakewood, Ohio 44107

For defendants-appellants:

JOHN H. GIBBON, Law Director
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, Ohio 44118

WALKER, *J.*:

Defendant-appellants, Robert Marth, *et al.*, timely appeal the trial court's granting of summary judgment in favor of plaintiff-appellee/cross-appellant, Joseph Shirokey, on his 42 U.S.C. Sec. 1983 action. For the following reasons, we affirm the decision of the trial court.

Appellee Joseph Shirokey is employed as a firefighter by appellant City of Cleveland Heights (hereinafter "the City") and is a classified civil service employee. On June 23, 1984, appellee took a written examination given by the City for promotion to the position of Fire Lieutenant. Appellee placed fourth on the eligibility list for promotion, which was certified by the City's Civil Service Commission on July 13, 1984.

On September 26, 1984, a vacancy existed in the Division of Fire for the position of Lieutenant. The City Manager is the appointing authority for the City pursuant to Article IV, Section 3 of the City's charter. Pursuant to Rule IV, Section 10(i) of the Civil Service Commission, referred to as the "one of three" rule, the City Manager requested the City Civil Service Commission to certify to him the three highest names on the eligibility list.

The "one of three" rule has been used in the City since 1936. Appellee was not certified because he was fourth on the list.

On September 29, 1984, another vacancy existed, and the Civil Service Commission certified the three highest names on the eligibility list. Appellee was on the list, but not appointed to the vacancy.

On October 2, 1984, a third vacancy existed in the rank of Lieutenant. Appellee's name was certified, but he was not appointed to the vacancy.

Pursuant to Rule IV, Section 10(i), "no name shall be certified more than twice to the same Appointing Authority for promotion from an eligibility list except on the written request of such Authority." Appellee, having been certified twice, was not certified for consideration a third time.

Subsequent to October 2, 1984, six more vacancies occurred, but appellee was not promoted. Of the nine total firefighters promoted to Lieutenant, seven were appointed on October 29, 1984, in order of numbers 1-3 and 5-8 on the eligibility list. Appellee, who was ranked fourth on the list, was passed over for promotion.

Appellee filed a complaint on August 1, 1985 against the City and various officials of the City, alleging a claim of entitlement to promotion under 42 U.S.C. Sec. 1983. Concurrently, appellee filed a writ of mandamus with the Eighth District Court of Appeals on August 20, 1985. The court of appeals dismissed the mandamus action, without opinion, upon motion of appellants on December 10, 1985. Appellee filed a motion for partial summary judgment on his Sec. 1983 claim on June 30, 1988. Appellants filed a cross-motion for summary judgment. The trial court granted appellee's motion for partial summary judgment and denied appellants' cross-motion for summary judgment on October 27, 1988. The trial court's order stated:

> Pltf's motion for partial summary judgment is granted as to finding that the city's civil service commission's rules and regulations were not properly adopted in accord with the charter; and on 1983 claim. Pltf's motion is granted relative to attorney fees, back pay, and seniority. Damage hearing will be set.

A judgment entry was issued on December 29, 1988, stating, in part, that "1.) The plaintiff is entitled to be appointed to the Office of [Lieutenant] Lt. . . . as of October 29, 1984."

A damage hearing was held on January 3, 1989, and the trial court entered final judgment on the previous judge's orders and ordered appellee's seniority as Lieutenant to commence as of October 29, 1984; ordered compensatory damages in the amount of $15,309.18 plus interest thereon in the amount of $6,587.92; and ordered litigation expenses, attorney's fees and court costs. The trial court subsequently reduced the interest award to $3,513.09.

Appellant/City now timely appeals the final judgment, and appellee cross-appeals.

ASSIGNMENT OF ERROR I.

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFF-APPELLEE ON HIS 42 U.S.C. SEC. 1983 CLAIM BECAUSE THERE WAS NO CONSTITUTIONAL DEPRIVATION AS APPELLEE POSSESSES NO PROPERTY OR LIBERTY INTEREST IN A JOB PROMOTION AND HE HAS ADEQUATE STATE REMEDIES.

Appellant argues the trial court erred in granting summary judgment for appellee on his 42 U.S.C. Sec. 1983 claim because appellee has no constitutionally-

protected liberty or property interest in being promoted and has adequate state remedies.

The threshold issue in any 42 U.S.C. Sec. 1983 action is whether the two essential elements of a Sec. 1983 action are present:

(1) whether the conduct complained of was committed by a person acting under color of state law; and

(2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor (1981), 451 U.S. 527, 536.

In *Board of Regents v. Roth* (1972), 408 U.S. 564, 577, the United States Supreme Court stated:

> To have a property interest in a benefit, a person *** must *** have a legitimate claim of entitlement to it ***. Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

We need not address the first element of a Sec. 1983 action because the City concedes that the city manager's action of appointing others than appellee from the eligibility list was "conduct . . . committed by a person acting under color of State law.".

As to the second element, appellee argues and the trial court agrees, that he has a constitutionally-protected property interest in being promoted under state civil service statutes, which statutes control here since the City's Civil Service Commission's rules were

not adopted in accord with the City Charter. We also agree with appellee that the state statutes control and create his entitlement and, thus, his property interest in being promoted.

It has been held that the municipal charter is basically the constitution of the municipality. *Cleveland, ex rel. Neelon v. Locher* (1971), 25 Ohio St. 2d 49, 51.

Article XII, Sec. 3 of the Charter of the City of Cleveland Heights mandates that Council "shall provide *by Ordinance* . . . the method and procedure for determining merit and fitness for employment and promotion in the classified service . . .." (Emphasis added.) Thus, the charter, by its terms, reserves and limits to council to provide by ordinance the procedure for determining promotion in the classified service.

Council cannot by ordinance divest itself of the power conferred upon it by the City Charter. *Bauman v. State, ex rel. Underwood* (1930), 122 Ohio St. 269, 270. Furthermore, no ordinance can conflict with the provisions of a city charter to be effective. *Reed v. Youngstown* (1962), 173 Ohio St. 265. Where an ordinance is in conflict with a charter provision, the charter prevails. *Gallagher v. City of Cleveland* (1983), 10 Ohio App. 3d 77.

In the present case, council enacted an ordinance which delegates to the City Civil Service Commission the power to provide by rules and regulations the basis for appointment and promotion in the classified service. Cleveland Heights Codified Ordinances Sections 137.09 and 137.17.[1] Pursuant to this ordinance, the Civil Service Commission promulgated Rule IV, Sec. 10(i), which reads in pertinent part:

[1] It should be noted that both of these ordinances expressly state they are subject to the limitations contained in the Charter.

> When an examination for promotion in the Divisions of Police and Fire has been completed and upon receipt of notice from the appointing authority that a vacancy exists in a particular rank the commission shall certify to such appointing authority, the three names graded highest on the appropriate eligible list. *Such appointing authority shall thereupon appoint one of the three so certified to fill the office* ***. *No name shall be certified more than twice to the same appointing authority for promotion from an eligible list,* except on the written request of such authority. (Emphasis added.)

The City promulgated its "one of three" rule, which resulted in appellee being removed from consideration for promotion after being passed over twice and not having been recertified a third time. The "one of three" rule used by the City to determine who is promoted was never adopted by ordinance by the council as required by the charter. Thus, it is ineffective. The charter clearly requires council to provide by ordinance the procedure for determining promotion in the classified service. Council's attempt to delegate this power to the Civil Service Commission is contrary to law and the charter, and, as such, the "one of three" rule has no legal effect. *See, Bauman, supra.*

City Codified Ordinance Section 137.08 mandates that where the charter and ordinances are silent, as here, the provisions of Ohio statutes govern. Ohio Revised Code Sections 124.45, 124.46, 124.47 and 124.48 outline the procedure to be used in the promotion of firemen. R.C. 124.46 and 124.48 state that after a competitive examination has been had, an eligibility list shall be made and used to certify the person having the highest position on the list. That person, and subsequent persons, shall be appointed within ten (10) days. Further, the list shall be used for two (2) years to fill subsequent vacancies as they occur.

Therefore, appellee has a "legitimate claim of entitlement to" be promoted to the position of Fire Lieutenant because of his rank on the promotional list. *Roth*, 407 U.S. at 577. Appellee was ranked fourth highest on the list. The City promoted nine firemen to the position of Fire Lieutenant, but passed over appellee. If the City had applied the controlling state law here to fill the vacancies, appellee would have been guaranteed a promotion to Lieutenant. The City's use of the rule in contravention of the charter deprived appellee of a legitimate claim of "entitlement" to be promoted. *Id.* Thus, we conclude appellee had a property interest in being promoted stemming from state law.

Appellants' argument that appellee failed to exhaust state remedies prior to bringing his 42 U.S.C. Sec. 1983 action, as required in *Parratt v. Taylor, supra*, is without merit. The Sixth Circuit Court has recently held:

> The rule in *Parratt* and *Vicory*, is clearly inapplicable "where the deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized conduct. *Hudson v. Palmer* (1983), 468 U.S. 517." *Watts v. Burkhart* (1988), 854 F.2d 839.

In the present case, the deprivation of appellee's property interest was a result of established city procedures. Therefore, exhaustion of state remedies was not required. Furthermore, it has been held in Ohio that exhaustion of administrative remedies is not required prior to obtaining relief pursuant to 42 U.S.C. Sec. 1983. *Gibney v. Toledo Bd. of Edn.* (1988), 40 Ohio St. 3d 152.

Accordingly, Assignment of Error No. I is overruled.

ASSIGNMENT OF ERROR II.

EVEN IF PLAINTIFF-APPELLEE COULD STATE A VIABLE 42 U.S.C. SEC. 1983 CLAIM, THE TRIAL COURT ERRED IN ISSUING A DECLARATORY JUDGMENT BECAUSE THE COURT LACKED JURISDICTION TO DO SO SINCE PLAINTIFF-APPELLEE FAILED TO SERVE THE OHIO ATTORNEY GENERAL WITH A COPY OF THE PROCEEDING AS REQUIRED BY O.R.C. SEC. 2721.12.

Appellant's argument that the court lacked jurisdiction because appellee failed to serve the Ohio Attorney General with a copy of the proceeding pursuant to R.C. 2721.12 is without merit. Appellee is not challenging the constitutionality of Cleveland Heights Codified Ordinance Section 137.17; thus, service of the attorney general was not necessary. R.C. 2721.12.

Assignment of Error No. II is overruled.

ASSIGNMENT OF ERROR III.

ASSUMING, *ARGUENDO*, PLAINTIFF-APPELLEE CAN STATE A FEDERAL CONSTITUTIONAL DEPRIVATION, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR APPELLEE DECLARING THE APPELLANT CITY'S CIVIL SERVICE RULES AND REGULATIONS INVALID BECAUSE CITY ORDINANCE 137.17 WHICH DELEGATES RULE-MAKING AUTHORITY TO THE CIVIL SERVICE COMMISSION IS A LAWFUL EXERCISE OF THE CITY'S HOME RULE POWERS UNDER THE CITY'S CHARTER AND THE OHIO CONSTITUTION.

As addressed previously in Assignment of Error No. I, this argument is without merit.

Assignment of Error No. III is overruled.

ASSIGNMENT OF ERROR IV.

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE DOCTRINE OF *RES JUDICATA* BARS PLAINTIFF FROM PROCEEDING WITH THIS ACTION.

Appellant argues the court of appeals dismissal of appellee's mandamus action operated as *res judicata*. We disagree.

Appellee filed his complaint with the court of common pleas on August 1, 1985. On August 20, 1985, appellee filed a mandamus action in the Court of Appeals for Cuyahoga County, Case No. 50783. The mandamus action was dismissed, without a hearing and without opinion, upon motion of appellants. The motion to dismiss raised the argument that appellee had an adequate remedy at law in a pending lower court action.

The court of appeals did not have jurisdiction to proceed on the mandamus since an action was pending in the lower court which provided for an adequate remedy at law. *State, ex rel. Woodbury v. Spitler* (1974), 40 Ohio St. 2d 1. While the court did not state a reason for the dismissal, we interpret the judgment of the court of appeals as ruling that it lacked jurisdiction. Pursuant to Civ. R. 41(B)(4)(a), a dismissal for lack of jurisdiction over the person shall operate as a failure otherwise than on the merits; thus, the judgment is not *res judicata*. *State, ex rel. Schneider v. North Olmsted Bd. of Edn.* (1988), 39 Ohio St. 3d 281.

Accordingly, Assignment of Error No. IV is overruled.

ASSIGNMENT OF ERROR V.

THE TRIAL COURT ERRED IN GRANTING INJUNCTIVE RELIEF TO APPELLEE UPON SUMMARY JUDGMENT AND IN STRIKING THE CITY'S EVIDENCE IN OPPOSITION THERETO BECAUSE A GENUINE ISSUE OF FACT EXISTS AS TO THE EQUITY OF GRANTING SUCH RELIEF.

Appellant argues the trial court erred in granting appellee injunctive relief under 42 U.S.C. Sec. 1983. Appellant also alleges the trial court failed to adequately consider the defense of laches.

The grant or denial of injunction is solely within the trial court's discretion, and a reviewing court should therefore not disturb the judgment of the trial court in that regard absent a showing of clear abuse of discretion. *Garono v. State* (1988), 37 Ohio St. 3d 171.

As we previously discussed, appellee has a constitutionally-protected property interest in being promoted. Thus, we cannot find that the trial court abused its discretion in issuing a permanent injunction ordering the City to promote appellee.

To invoke the doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay. *Thirty-four Corp. v. Sixty-Seven Corp.* (1984), 15 Ohio St. 3d 350, syllabus two. We conclude that appellant has failed to allege how it was materially prejudiced by appellee's filing of a complaint one month after the eligibility list expired.

Accordingly, Assignment of Error No. V is overruled.

ASSIGNMENT OF ERROR VI.

THE TRIAL COURT ERRED IN AWARDING ATTORNEYS'S FEES UNDER 42 U.S.C. SEC. 1988 AND, EVEN IF SUCH FEES WERE AWARDABLE, THE TRIAL COURT'S AWARD WAS EXCESSIVE.

The amount of attorney fees granted under 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec. 1988, if any, is within the sound discretion of the trial court. *McCann v. Coughlin* (C.A. 2, 1983), 698 F.2d 112, 129. After a review of the record, we find the trial court did not abuse its discretion in its award of attorney fees.

Assignment of Error No. VI is overruled.

ASSIGNMENT OF ERROR VII.

THE TRIAL COURT ERRED IN AWARDING BACKPAY (SIC.) AND SENIORITY.

ASSIGNMENT OF ERROR VIII.

THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON THE JUDGMENT.

Appellant argues that appellee had no right to back pay and seniority relying on *State, ex rel. Gibbons v. Cleveland* (1984), 9 Ohio St. 3d 216, 217 and *State, ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St. 3d 106. These cases are not controlling as to this federal claim because they involved only state causes of action and, thus, the courts were limited to state law remedies.

Appellee is entitled to collect compensatory damages pursuant to 42 U.S.C. Sec. 1983. *McCann v. Coughlin* (C.A. 2, 1983), 698 F.2d 126; *see, Lowary v. Lexington*

Local Bd. of Educ. (N.D. Ohio 1988), 704 F. Supp. 1456, 1471. The supreme court in *Carey v. Piphus* (1978), 435 U.S. 247, held "... the basic purpose of a Sec. 1983 damages award should be to compensate persons for injuries caused by deprivation of constitutional rights. ..." In order to obtain compensatory damages, appellee must demonstrate that the constitutional deprivation caused him some actual injury. *Id.*

In the present case, the trial court awarded appellee actual damages representing the difference in the rates of pay between Lieutenant and Firefighter as of October 29, 1984, plus interest, as well as his seniority. Upon a review of the record, we find that appellee has demonstrated that this award will compensate him from being deprived of a constitutionally-protected property interest in being promoted to Fire Lieutenant.

Therefore, we conclude the trial court did not abuse its discretion in its award of back pay, plus interest thereon, and seniority because said damage award represents appellee's actual damages and is, therefore, permitted pursuant to 42 U.S.C. Sec. 1983.

Assignments of Error Nos. VII and VIII are overruled.

CROSS-ASSIGNMENT OF ERROR I.

WHETHER THE TRIAL COURT ERRED WHEN IT DID NOT LEAVE OPEN THE ISSUE OF ADDITIONAL BACK-PAY, COSTS, ATTORNEYS' FEES, ETC., SUBSEQUENT TO JANUARY 7, 1989.

Appellee/cross-appellant argues the trial court erred in not leaving open the issue of a further hearing on the issue of post-judgment damages, attorney's fees and costs.

As we have stated previously, a review of the record demonstrates that the trial court did not abuse its discretion in its award of attorney fees. *See, McCann v. Coughlin* (1983), 698 F.2d 112, 129.

Furthermore, this issue was not raised in the lower court. An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Williams* (1977), 51 Ohio St. 2d 112.

Cross-Assignment of Error No. I is overruled.

CROSS-ASSIGNMENT OF ERROR II.

WHETHER THE TRIAL COURT ERRED WHEN IT DID NOT CORRECT THE TYPOGRAPHICAL ERROR IN ITS JUDGMENT, WHICH AWARDED ATTORNEYS' FEES UNDER 42 U.S.C. SEC. 1983 AND SEC. 1984, AS OPPOSED TO SEC. 1983 AND 1988.

We can find no evidence in the record that this alleged error was brought to the attention of the trial court. Therefore, we need not address an error which was not considered by the trial court. *State v. Williams* (1977), 51 Ohio St. 2d 112.

Cross-Assignment of Error No. II is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DAVID T. MATIA, *P.J.*
STILLMAN, *J.** *CONCUR*

/s/ ROBERT D. WALKER, Judge
Robert D. Walker

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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* Sitting by Assignment: Robert D. Walker, Judge of the Hancock County Court of Common Pleas; Saul G. Stillman, retired Judge of the Eighth Appellate District.

FINAL JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated January 25, 1989)

Case No. 95478

IN THE COURT OF COMMON PLEAS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

JOSEPH J. SHIROKEY,
Plaintiff,

vs.

ROBERT MARTH and
CITY OF CLEVELAND HEIGHTS,
OHIO, *et al.*,
Defendants.

FINAL JUDGMENT ENTRY

The within action was heretofore assigned for disposition to Judge Francis E. Sweeney.

A Motion for Partial Summary Judgment was duly filed by the plaintiff together with a Cross-Motion for Partial Summary Judgment by defendants. Both of said motions were decided by Judge Sweeney under the date of October 27, 1988 and a copy of his Memorandum Entry with respect to the plaintiff's motion is attached hereto, marked Exhibit "A" and made a part hereof. His decision with respect to defendant's cross-motion is attached hereto, made a part hereof and marked Exhibit

"B". On December 29, 1988, Judge Sweeney filed a Journal Entry to further explain the court's ruling on October 27, 1988 and a copy of said entry is attached hereto, made a part hereof and marked Exhibit "C".

Because of Judge Sweeney's election to the Eighth District Court of Appeals, the within action was transferred to Judge George J. McMonagle for decision of the issues that had not been disposed of and for the entry of final judgment hereon.

The issues that had not been disposed of by Judge Francis E. Sweeney were duly heard and decided by Judge George J. McMonagle.

IT IS THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff is entitled to be appointed to the office of Lieutenant in the Cleveland Heights Fire Department as of October 29, 1984, and the defendants are ordered to do so immediately and have their records so indicate.

2. The plaintiff's seniority as Lieutenant shall start as of October 29, 1984, and his seniority in the Fire Department from the date of his original appointment.

3. The plaintiff is entitled to be compensated in an amount equal to the difference between that which was received by the plaintiff as a fireman and that which he should have received as Lieutenant had he been promoted as of October 29, 1984. The sum of money that the plaintiff is entitled to recover by judgment against the City of Cleveland Heights, is the amount of Fifteen Thousand Three Hundred Nine Dollars and 18/100 ($15,309.18) as compensatory damages and interest thereon in the sum of Six Thousand Six Hundred Eighty Seven Dollars and 62/100 ($6,687.62).

4. The plaintiff is further entitled to recover from the defendant, the City of Cleveland Heights, his reasonable litigation expenses in the amount of Two Thousand Two Hundred Thirty Three Dollars and 88/100 ($2,233.88).

5. The Court further finds that the plaintiff is entitled to recover by judgment from the City of Cleveland Heights, Ohio a reasonable sum for his attorneys' fees pursuant to 42 U.S.C. 1983 and 42 U.S.C. 1984. The Court finds from a consideration of all the evidence of the case, giving it such weight as it deserves under the facts and circumstances herein and as presented by the evidence that the sum of Forty-One Thousand Five Hundred Dollars and 00/100 ($41,500.00) is such a reasonable sum for the necessary attorneys' fees. Ten percent (10%) of which amount, or Four Thousand One Hundred Fifty Dollars ($4,150.00) is for the legal services rendered by John M. Bostwick, Jr., Esq., and the balance of Thirty-Seven Thousand Three Hundred Fifty Dollars ($37,350.00) for the legal services rendered by Mary E. Papcke, Esq. Judgment for said sum of Forty-One Thousand Five Hundred Dollars ($41,500.00) is hereby rendered against the City of Cleveland Heights, Ohio.

6. No punitive damages are awarded against the defendant, the City of Cleveland Heights, Ohio.

7. Defendant City of Cleveland Heights and any of its employees or agents shall not proceed with any disciplinary charges against plaintiff which are pending as of the date of this entry, and the said City of Cleveland Heights withdraws any such pending disciplinary charges.

8. The previously ordered temporary injunction, permanent injuction, and stay prohibiting defendants from proceeding with disciplinary action against plaintiff are hereby dissolved as to any and all matters occurring on or after the date of this entry.

9. Plaintiff's attorney has heretofore stated in open court that all individual defendants, that is, all defendants other than the City of Cleveland Heights, Ohio, are being dismissed as parties hereto, and it is hereby so ordered, per C. R. 41(a).

10. The court costs are hereby assessed against the defendant, City of Cleveland Heights, Ohio.

11. This Judgment Entry constitutes a final judgment on all of the issues in the within case.

/s/ GEORGE J. MCMONAGLE
George J. McMonagle, *Judge*

DATE: January 25, 1989

EXHIBIT A

DATE 10/27/88

NUNC PRO TUNC ENTRY AS OF & FOR _____/_____/_____

Pltf's motion for partial summary judgment is granted as to finding that the city's civil service commission's rules and regulations were not properly adopted in accord with the charter; and on 1983 claim. Pltf's motion is granted relative to attorney fees, back pay, and seniority. Damage hearing will be set.

/s/ FRANCIS E. SWEENEY
Judge

EXHIBIT B

CASE NO. 095478

ASSIGNED JUDGE Francis E. Sweeney

Joseph Shirokey VS Robert Marth, et al.

DATE 10/27/88

NUNC PRO TUNC ENTRY AS OF & FOR _____/_____/_____

Deft's cross-motion for summary judgment is denied as to Attorney fees, back pay, and seniority. Pltf. had a right to be promoted in October 1984 due to the rules used by deft not being adopted in accord with the charter. Damage hearing will be set.

/s/ FRANCIS E. SWEENEY
Judge

EXHIBIT C

Case No. 95478

IN THE COURT OF COMMON PLEAS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

JOSEPH SHIROKEY,
Plaintiff,

vs.

ROBERT MARTH, FIRE CHIEF OF CLEVELAND HEIGHTS FIRE DEPARTMENT, *et al.*,
Defendant.

JUDGMENT ENTRY

Judgment entry to further explain the Court's ruling on October 27, 1988 is as follows:

1. The plaintiff is entitled to be appointed to the Office of Lt. in the Cleveland Heights Fire Department as of October 29, 1984 and the defendants are ordered to have the records so indicate.

2. The plaintiff's seniority as Lt. shall start as of October 29, 1984 and his seniority in the Fire Department from the date of his original appointment.

3. The plaintiff is entitled to be compensated in an amount equal to the difference between a Lt.'s salary and the amount he received as a fireman from said date up to present time.

4. The plaintiff is entitled to recover a reasonable amount for the services of his attorney in the prosecution of the within action. This amount shall be determined in a hearing to the Court and not to a jury. All other issues shall also be determined by the Court and not by a jury.

5. No punitive damages may be assessed against the City of Cleveland Heights. These rulings are based on the provisions of 42 U.S.C. 1983 and the Common Law.

The remaining issues to be determined are:

1. What sum of money is plaintiff entitled to recover as attorney's fees?

2. What sum of money is plaintiff entitled to recover as compensatory damages?

All other claims have been dismissed by the plaintiff as to all defendants except defendant City of Cleveland Heights.

/s/ FRANCIS E. SWEENEY
Judge

Dated: December 29, 1988

AMENDMENT TO FINAL JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated March 31, 1989)

Case No. 95478

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH J. SHIROKEY,
Plaintiff,

vs.

ROBERT MARTH, *et al.*,
Defendants.

AMENDMENT TO FINAL JUDGMENT ENTRY

Pursuant to Ohio Rules of Civil Procedure 60(B), the final judgment in the above-referenced case, which was filed on February 13, 1989, is hereby amended to order interest on the judgment in the amount of $3,513.09 (Three thousand five hundred thirteen dollars and 09/100) instead of the sum previously awarded of $6,687.62 (Six thousand six hundred eighty-seven dollars and 62/100) as set forth in the Final Judgment Entry. Objections of counsel for the Defendant is hereby noted.

/s/ GEORGE J. MCMONAGLE
Judge

ORDER OF THE SUPREME COURT OF OHIO DENYING PETITION FOR REHEARING

(Dated April 15, 1992)

Case No. 90-1760

THE SUPREME COURT OF OHIO

JOSEPH SHIROKEY,
Appellee,

v.

ROBERT MARTH, *et al.;*
CITY OF CLEVELAND HEIGHTS,
Appellant.

REHEARING ENTRY

(Cuyahoga County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals Nos. 57267 & 57412)

/s/ THOMAS J. MOYER
Chief Justice

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

OHIO REVISED CODE §124.34

124.34 Tenure of office; reduction, suspension, and removal; appeal

The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the

director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

In the case of the suspension for any period of time, or demotion, or removal of a chief of police or a chief of a fire department or any member of the police or fire department of a city or civil service township, the appointing authority shall furnish such chief or member of a department with a copy of the order of suspension, demotion, or removal, which order shall state the reasons therefor. Such order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of such order such chief or member of a department may file an appeal, in writing, with the municipal or civil service township civil service commission. In the event such an appeal is filed, the commission shall forthwith notify the appointing

authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the municipal or civil service township civil service commission to the court of common pleas in the county in which such city or civil service township is situated. Such appeal shall be taken within thirty days from the finding of the commission.

OHIO REVISED CODE §124.45

124.45 Promotion of firemen

Vacancies in positions above the rank of regular fireman in a fire department shall be filled by competitive promotional examinations, and promotions shall be by successive ranks as provided in this section and sections 124.46 to 124.49 of the Revised Code. Positions in which such vacancies occur shall be called promoted ranks.

When a vacancy occurs in the promoted rank immediately above the rank of regular fireman, no person shall be eligible to take the examination unless he has served twenty-four months in the rank of regular firemen, provided in those cases where there are less than two persons in the rank of regular firemen who have served twenty-four months therein and are willing to take the examination, the twenty-four month service requirement does not apply.

When a vacancy occurs in a promoted rank, other than the promoted rank immediately above the rank of regular fireman, no person shall be eligible to take the examination unless he has served twelve months in the rank from which the promotion is to be made, provided in those cases where there are less than two persons in such next lower rank who have served twelve months therein and are willing to take the examination the twelve months service requirement shall not apply. If the nonapplication of the twelve month service requirement to persons in the next lower rank does not produce two persons eligible and willing to compete, then the same method shall be followed by going to successively lower ranks until two or more persons are eligible and willing to compete in an examination for the vacancy. In the

event this process of searching succesively lower ranks reaches the rank of regular fireman, the twenty-four month service requirement applies, provided in those cases where such application still fails to produce two persons who are eligible and willing to compete, said twenty-four month service requirement does not apply. In the event two persons are unwilling to compete for such examination, then the one person who is willing to compete shall be appointed to fill the vacancy after passing a qualifying examination.

Promotional examinations for positions within a fire department shall relate to those matters which test the ability of the person examined to discharge the particular duties of the position sought and shall be in writing, provided, in examinations for positions requiring the operation of machines or equipment, practical demonstration tests of the operation of such machines or equipment may be a part of the examination.

Those persons who compete in a promotional examination in accordance with the rules of the civil service commission shall have added to their grade credit for seniority. Credit for seniority shall be given as follows: one point shall be added for each of the first four years of service and six-tenths of a point shall be added for each year for the next ten years of service. In computing the credit for seniority, half of the credit above set out shall be given for a half year of service. Credit for seniority shall be based only on service in the municipal or civil service township fire department and the service provided for in the next succeeding paragraph.

When service in a municipal or civil service township fire department is interrupted by service in the armed forces of the United States, seniority credit

shall be granted in promotional examinations for the time so served. No additional credit for military service shall be allowed in promotional examinations.

Credit for efficiency may be given as an added credit and shall be ten per cent of the member's efficiency rating for the last year and shall be based on the record of efficiency maintained in the fire department in the manner established by the civil service commission, provided the efficiency shall be graded by three ranking officers of the fire department familiar with the work of the member. In those cases where three such officers do not exist the ranking officers or officer familiar with the work of the member shall grade the efficiency.

No credit for seniority, efficiency, or any other reason shall be added to an applicant's grade unless the applicant achieves at least the minimum passing grade on the examination without counting such extra credit.

After a promotional examination has been held and prior to the grading of such examination papers, each participant in said promotional examination shall have a period of five days, exclusive of Saturdays, Sundays, and holidays, to inspect the questions, the rating keys or answers to the examination and to file any protest he may deem advisable. These protests shall be in writing and shall remain anonymous to the commission. All protests with respect to rating keys or answers shall be determined by the commission within a period of not more than five days, exclusive of Saturdays, Sundays, and holidays, and its decision shall be final. If the commission finds an error in the rating key or answer, it shall publish a revised rating key within five days of its finding of such error or errors. The revised rating key or

answer shall then be available to participants for a period of five days, exclusive of Saturdays, Sundays, and holidays, subsequent to such determination of error or errors.

After the grading of such examination papers, any participant in the examination who deems his examination papers have been erroneously graded, shall have the right to appeal to the commission, and said appeal or appeals shall be heard by the commission.

The public notice of a holding of a promotional examination for a position or positions in a fire department shall, unless waived by all persons eligible to participate, be published not less than thirty days prior to the examination and shall contain a description of the source material from which the examination questions are prepared. Such source material shall be readily accessible to the examinee. Failure to comply with this requirement shall make void the pursuant examination. This paragraph does not prohibit the use of questions having answers based on experience in the fire service within the fire department in which the promotional examination is being given.

OHIO REVISED CODE §124.46

124.46 Eligible lists for firemen

The names of the examinees shall be placed on the eligible list in accordance with their grades; the one receiving the highest grade shall be placed first on the list. In the event two or more examinees receive the same grade, seniority in the fire department service shall determine the order of their names. The person having the highest position on the list shall be appointed in the case of a vacancy. Eligible lists established as provided in this section shall continue for two years. In the event a vacancy occurs prior to the expiration of the two year period, the list shall continue for the purpose of filling such vacancy and the vacancy has been filled.

Where an eligible list exists and a vacancy occurs which may be filled from such eligible list, the vacancy shall be filled within a period of not more than ten days from the date of such vacancy.

OHIO REVISED CODE §124.47

124.47 Special positions for firemen

Within any rank, the municipal council or board of trustees of a civil service township may establish such special positions having special duties with preferential pay as the council or board deems necessary, but the holding of any such special positions shall not establish eligibility to the next higher rank to the exclusion of other persons in the same rank who do not hold such special positions. No special position established by council or the board within a rank in a fire department shall be filled without promotional examination in the same manner as promotions from rank to rank.

OHIO REVISED CODE §124.48

124.48 Filling of vacancies

Whenever a vacancy occurs in a promoted rank in a fire department and no eligible list for such rank exists, the appointing authority shall certify the fact to the civil service commission, and the civil service commission shall within sixty days of such vacancy conduct a competitive promotional examination. After such examination has been held, an eligible list shall be established within twenty days of the final date of the revised rating key or answer inspection date and the civil service commission shall certify to the appointing authority the name of the person receiving the highest grade. Upon such certification, the appointing authority shall appoint the person so certified within ten days.

When an eligible list is in existence and a vacancy occurs in a position for which the list was established, the appointing authority shall certify the fact to the civil service commission. The person standing highest on such list shall be certified to the appointing authority, and such person shall be appointed within ten days.

OHIO REVISED CODE §124.49

124.49 Probationary period; appointment

All promotional appointments in a fire department may be for a probationary period to be fixed by the rules of the civil service commission and not to exceed six months. No promotion shall be deemed final until the appointee has satisfactorily served his probationary period. At the end of the probationary period the appointing authority shall transmit to the civil service commission a record of the employee's service, and if such service is satisfactory the appointee shall continue in his promoted rank. If at the end of the probationary period the appointee's service is unsatisfactory, he shall be reduced to the rank held at the time he was appointed to the higher rank. In all cases of unsatisfactory probationary periods in the fire department, the appointing authority shall, at the end of the probationary period, furnish the employee with a written notice of unsatisfactory probation and a detailed statement of the basis for such finding. Within ten days thereafter such employee may appeal from the decision or order of the appointing authority to the municipal or civil service township civil service commission, and the commission shall hear, or appoint a trial board to hear, such employee's appeal within thirty days from its filing with the commission. An appeal to determine the sufficiency of the cause of demotion may be had from the decision of the commission to the court of common pleas of the county in which the municipality or township is situated. The appeal shall be taken within twenty days from the decision of the commission.

CLEVELAND HEIGHTS CIVIL SERVICE RULE IV §10(I)

When an examination for promotion in the Divisions of Police and Fire has been completed and upon receipt of notice from the Appointing Authority that a vacancy exists in a particular rank, the Commission shall certify to such Appointing Authority, the three names graded highest on the appropriate eligible list. Such Appointing Authority shall thereupon appoint one of the three so certified to fill the office. In case there is more than one vacancy to be filled, additional names shall be certified, so that at least twice more eligibles than positions to be filled shall be certified. If there are less than three names on an eligible list because less than three candidates were eligible for, or did not compete for, or did not pass an examination for promotion, then the Commission shall certify the names or name comprising the respective list for appointment, and the Appointing Authority shall appoint one of the two candidates, or the candidate on the list, to fill any such vacancy existing. No name shall be certified more than twice to the same Appointing Authority for promotion from an eligibility list, except on the written request for such authority.

PENNSYLVANIA STATUTE 24 §11-1121

§11-1121. Contracts; execution; form

In all school districts, all contracts with professional employes shall be in writing, in duplicate, and shall be executed on behalf of the board of school directors by the president and secretary and signed by the professional employe.

Each board of school directors in all school districts shall hereafter enter into contracts, in writing, with each professional employe who has satisfactorily completed two (2) years of service in any school district of this Commonwealth. Said contracts shall contain only the following:

"IT IS AGREED by and between ..... Professional Employe, and the Board of Directors (or Board of Public Education) of the school district of ....., Pennsylvania, that said professional employe shall, under the authority of the said board and its successors, and subject to the supervision and authority of the properly authorized superintendent of schools or supervising principal, serve as a professional employe in the said school district for a term of ..... months, for an annual compensation of $....., payable monthly or semi-monthly during the school term or year, less the contribution required by law to be paid to the Public School Employes' Retirement Fund, and less other proper deductions for loss of time.

"This contract is subject to the provisions of the 'Public School Code of 1949' and the amendments thereto.[1]

"AND IT IS FURTHER AGREED by the parties hereto that none of the provisions of this act may be waived either orally or in writing, and that this contract shall continue in force year after year, with the right of the board of school directors (or board of public education) to increase the compensation over the compensation herein stated, from time to time, as may be provided under the provisions and proper operation of the established salary schedule, if any, for the school district, subject to the provisions of law, without invalidating any other provision of this contract, unless terminated by the professional employe by written resignation presented sixty (60) days before resignation becomes effective, or by the board of school directors (or board of public education) by official written notice presented to the professional employe: Provided, That the said notice shall designate the cause for the termination and shall state that an opportunity to be heard shall be granted if the said professional employe, within ten (10) days after receipt of the termination notice, presents a written request for such hearing."

AFFIDAVIT OF JULIAN M. SUSO

State of Ohio)
) ss:
County of Cuyahoga)

I, Julian M. Suso, having first been duly sworn according to law, depose and state that:

1. I am the Vice City Manager of the City of Cleveland Heights, Ohio, and have been appointed by the City Manager to serve as Secretary to the City's Civil Service Commission, which entails being the custodian of the records of the Civil Service Commission;

2. Attached hereto as Exhibits A-1 and A-2, respectively, are copies of: a) City Ordinance No. 68-1932, passed in 1932, creating the City's Civil Service Commission and empowering it to promulgate rules regarding promotions in the City's civil service; b) Rule VI, of the Civil Service Rules and Regulations, adopted January 1, 1936, regarding the filling of vacancies in the civil service, including promotions, which directs the Appointing Authority to select "one of the three" names certified to fill a vacancy;

3. The City's "one-of-three" rule has been in existence continuously since 1936 and is presently used by the City Manager/Public Safety Director, as the legally designated Appointing Authority, in selecting persons to fill vacancies in the civil service ranks;

4. I have reviewed the records of the Civil Service Commission and determined that Firefighter Joseph Shirokey never requested an investigation or hearing by the Commission as a result of his not being promoted to lieutenant from the eligibility list certified July 13, 1984;

5. I have reviewed the records of the Civil Service Commission which show that the last eligible list for Fire Lieutenant which contained Firefighter Joseph J. Shirokey's name was the list certified on July 13, 1984, which expired on July 14, 1985; that Firefighter Shirokey was eligible to take an examination for Fire Lieutenant given on February 28, 1987; that Shirokey did not apply to take said examination; that an eligible list was certified from said examination on April 1, 1987; and that an appointment to Fire Lieutenant has been made from the April 1, 1987 eligibility list. (See copy of the 4/1/87 eligibility list attached hereto as Exhibit A-3.)

Further Affiant Sayeth Naught Under Penalty of Law.

/s/ JULIAN M. SUSO

Sworn to and subscribed in my presence this 11th day of August, 1988.

/s/ R. TODD HUNT, Attorney
Notary Public
State of Ohio
My commission has no
expiration date
Section 147.03 R. C.

DEFENDANT'S ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS PROPOUNDED TO DEFENDANT DONALD BARCLAY

Case No. 95478

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH SHIROKEY,
Plaintiff,

vs.

ROBERT MARTH, *et al.*,
Defendants.

JUDGE FRANCIS E. SWEENEY

Pursuant to the Ohio Rules of Civil Procedure 36 and 37, Plaintiff, by and through his attorney, propounds the following requests for admissions to the Defendant, Donald Barclay, to be fully answered in writing, within 28 (twenty-eight) days after service in accordance with the Ohio Rules of Civil Procedure.

Instructions for Answering:

1. You are required personally to answer each of the following requests for admissions of your own knowledge and to personally respond thereto.

2. You are reminded that all answers must be made separately and fully and that an incomplete or evasive answer is a failure to answer.

3. You are under a continuing duty seasonably to supplement your response with respect to any requests propounded in these requests for admissions and to correct any response which you know or later learn is incorrect.

REQUEST FOR ADMISSIONS:

1. Do you admit that the Charter of the City of Cleveland Heights requires the Cleveland Heights City Council to, "... provide by ordinance the powers, duties and jurisdiction of the Civil Service Commission, the determination of the positions of employment which shall comprise the classified and unclassified services of the City, the method and procedure for determining merit and fitness for employment and promotion in classified service, and such other matters relating to classified employment service as may be necessary and proper?"

ANSWER: Admit.

2. Do you admit that the Cleveland Heights City Council has never provided by ordinance, the methods and procedures for determining merit and fitness for employment and promotion in classified service?

ANSWER: Deny.

3. Do you admit that the Civil Service Commission of the City of Cleveland Heights used rules and regulations in determining merit and fitness, methods and procedures for promotion that were never adopted by ordinance by the Cleveland Heights City Council as required by their City Charter?

ANSWER: Admit the Civil Service Commission used rules and regulations which were not adopted by ordinance after-the-fact but that were properly

promulgated pursuant to the City's Charter and ordinances and, therefore, deny that adoption by ordinance was required by the City Charter.

4. Do you admit that the Civil Service Commission and the City of Cleveland Heights used rules and regulations which were never adopted by ordinance as required by the Cleveland Heights City Charter in determining the Plaintiff's eligibility for promotion?

ANSWER: Admit that the Civil Service Commission used rules and regulations in determining Plaintiff's eligibility for promotion that were not adopted by ordinance after-the-fact but were properly promulgated under the City's Charter and ordinances and, therefore, deny that adoption by ordinance was required by the City Charter.

5. Do you admit that the method and procedure for appeal from the Civil Service Commission's ruling with respect to merit and fitness and methods and procedures for a promotion were never adopted by ordinance as required by the Charter of the City of Cleveland Heights?

ANSWER: Defendant cannot admit or deny because the method and procedure for appeal from the Civil Service Commission's rulings are governed by the Ohio Revised Code. *See eg.*, Chapter 2506 of the Revised Code.

6. Do you admit that since the method and procedures for determining merit and fitness for employment and promotion in classified service were never properly adopted by ordinance as required by the Charter, that the rules are null and void and have no legal effect?

ANSWER: Deny.

7. Do you admit that since the rules and regulations, methods and procedures for determining merit and fitness for employment and promotion in the classified service were null and void and of no legal effect, that it was illegal to use such rules, regulations, methods and procedures in determining the eligibility of the Plaintiff for promotion?

ANSWER: Deny.

Answers to the foregoing requests for admission provided by:

/s/ JOHN H. GIBBON
John H. Gibbon, Director of Law
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, OH 44118
(216) 291-5775
Attorney for Defendant Barclay

/s/ MARY E. PAPCKE
Mary E. Papcke
Attorney for the Plaintiff
18501 Detroit Ave.
Lakewood, Ohio 44107
(216) 521-0440

PROOF OF SERVICE

The original and one copy of Plaintiff's Request for Admissions propounded to Defendant Donald Barclay, and the copies of the Request for Admissions to Defendants Chief Robert Marth and Robert Downey, have all been hand-delivered to Jules Koach and John Gibbon, attorneys for all the Defendants, to 40 Severance Circle, Cleveland Hts., Ohio, 44118, this 20th day of August, 1987.

/s/ MARY E. PAPCKE
Mary E. Papcke
Attorney for the Plaintiff
18501 Detroit Ave.
Lakewood, Ohio 44107
(216) 521-0440

CERTIFICATE OF SERVICE

The original of the Answers to Plaintiff's Request for Admissions propounded to Defendant Robert Downey was mailed by certified U.S. mail this 17th day of September, 1987 to Mary E. Papcke, Esq., attorney for plaintiff, 18501 Detroit Avenue, Lakewood, Ohio 44107.

/s/ JOHN H. GIBBON
John H. Gibbon, Director of Law
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, Ohio 44118
(216) 291-5775
Attorney for Defendant
Robert Downey

Supreme Court, U.S.
FILED
AUG 7 1992
OFFICE OF THE CLERK

(2)

CASE NO. 92-71

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

v.

CITY OF CLEVELAND HEIGHTS,
Respondent.

Petition For Writ Of Certiorari
To The Ohio Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. GIBBON, Director of Law
Counsel of Record for Respondent
and
ROBERT TODD HUNT, Assistant
Director of Law
Counsel for Respondent
City of Cleveland Heights
40 Severance Circle
Cleveland Heights, Ohio 44118
(216) 291-5775

August 10, 1992

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No. 92-71

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

v.

CITY OF CLEVELAND HEIGHTS,
Respondent.

Petition For Writ of Certiorari
To The Ohio Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The salient point of the Ohio Supreme Court's holding in this case is that Petitioner Shirokey was afforded constitutionally adequate procedural due process under the State of Ohio's legal remedies and the City of Cleveland Heights' civil service rules when he was passed over for promotion in the City's Division of Fire. The Ohio Supreme Court's opinion expresses the holding that regardless of whether Petitioner has a property interest in a job promotion, neither the substantive nor procedural due process rights guaranteed by the Fourteenth Amendment were violated.

Petitioner concedes that a substantive due process violation is not involved in this case. Therefore, when this case is properly analyzed under the *Mathews v. Eldridge,* 424 U.S. 319 (1976) test to determine what procedural safeguards the Constitution requires in a given case, as was accomplished by the Ohio Supreme Court in its opinion, the result is that no predeprivation process would have been effective *under the facts of this case.* Additionally, the court properly found that Petitioner had a panoply of adequate remedies under state law to address the substantive law issue in this case -- i.e., whether the City's civil service rules regarding promotion are superceded by state statute which require Petitioner to be promoted. Such remedies include a declaratory judgment action, petition for a writ of mandamus, breach of contract action, an administrative investigation and hearing, and an administrative appeal to the state court system.

ARGUMENT

When all is said and done, Shirokey's Petition for Writ of Certiorari is asking the United States Supreme Court to review, under the guise of a §1983 claim, an *Ohio state law issue which was specifically and deliberately never reached by the Ohio Supreme Court*!!

For his first and primary reason as to "Why the Writ Should be Granted", Petitioner states: "The Ohio Supreme Court's Decision that the Petitioner Shirokey Did Not Have a Constitutionally Protected Property Interest in a Promotion as a Public Employee is Contrary to United States Supreme Court Precedent". [Petition for Writ of Certiorari, p. 9]. He then urges this Court to "scrutinize" the Ohio state civil service statutes "to determine whether they created a property interest"

and he directs the Court's attention to a comparison of Cleveland Heights civil service provisions and state civil service statutes. [Petition for Writ of Certiorari, p.11]

In emphasizing the state law issues, Petitioner masks the thrust of the decision of the Ohio Supreme Court which held that he had failed to state a cause of action. Shirokey's lawsuit was brought under 42 U.S.C. §1983. As recognized by the Ohio Supreme Court, the determinative issue was not whether Shirokey was deprived of a state law property interest, but rather whether he was deprived of due process of law under the Fourteenth Amendment so as to be entitled to 42 U.S.C. §1983 relief.

> The constitutional infringement under the Fourteenth Amendment is not the deprivation of a property interest *per se*, but is instead the *manner* by which the property is taken.

[Opinion of Ohio Supreme Court, *citing Cooperman v. Univ. Surgical Assoc., Inc.*, 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987), at p. A10 of Petitioner's Appendix].

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*

[Opinion of Ohio Supreme Court, *citing Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (citation omitted), at p. A12 of Petitioner's Appendix].

The gravamen of Shirokey's claim is that the City's own civil service rules are invalid (indeed, he claims they have been invalid since 1936) and, therefore, he should have been appointed to the position of fire lieutenant under state civil service rules. He claims that the City's refusal to appoint him to this position violated state civil service law and, therefore, in turn violated the Fourteenth Amendment's guarantee of procedural due process. Petitioner's misunderstanding of the right to procedural due process is exemplified by his statement in his Petition at page 20 that "[i]n order for the city to give a [sic] predeprivation due process it only had to follow the law of the state".

In analyzing Shirokey's civil rights claim, the Ohio Supreme Court properly found it unnecessary to reach the issue of whether Shirokey had a property right or whether the City's civil service rules were valid. At the conclusion of its opinion, the Court stated:

> Accordingly, we express no view on the ultimate merits of Shirokey's claim except to hold that his complaint failed to state a claim under Section 1983 for the violation of his substantive or procedural due process rights.

[Opinion of Ohio Supreme Court, at p. A16 of Petitioner's Appendix]. Therefore, the only issue determined by the Ohio Court was whether Shirokey was denied any "process" to which he was "due" under the United States Constitution. Unless Petitioner can establish that his right to due process was violated, he has no claim under 42 U.S.C. §1983.

The Cleveland Heights City Manager, the City's appointing authority, does not have the authority to

declare City ordinances or rules invalid nor does any other board or commission of the City. Any predeprivation hearing by them on the issue raised by Shirokey would have been a totally vain act and, not surprisingly, Shirokey did not seek such a hearing.[1] The only appropriate "process" to resolve the issue raised by Shirokey -- i.e., the validity of the City's civil service rule under the City's charter and under *state* law -- is application to the state courts. The State of Ohio affords this "process" to Shirokey through several recognized types of actions: (1) a declaratory judgment action; (2) a petition for writ of mandamus; (3) a breach of contract action; and (4) an administrative appeal to the state courts. All of these are routinely used in Ohio by litigants to test the validity of municipal regulations and ordinances. *See State, ex rel. Bardo v. Lyndhurst*, 37 Ohio St. 3d 106, 524 N.E.2d 447 (1988) (petition for writ of mandamus); *Lynch v. Tiffenbach*, 14 Ohio App. 3d 174, 470 N.E.2d 445 (1984) (declaratory judgment and injunction); *Taylor v. City of Middletown*, 58 Ohio App. 3d 88, 568 N.E.2d 745 (1989) (appeal from decision of civil service commission). All of these remedies were available to Petitioner Shirokey and afforded him ample due process to raise any and all claims had he chosen to avail himself of them.

An excellent case illustrating the procedural avenues afforded by Ohio law in an almost identical situation to that of Petitioner Shirokey is *State, ex rel. Firefighters v. East Cleveland*, 40 Ohio St. 3d 222, 533 N.E.2d 282 (1988). In the *East Cleveland* case, two firefighters sought to compel the mayor of the city to

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[1]The Ohio Supreme Court, however, recognized Petitioner's right to request an investigation and hearing by the City's Civil Service Commission pursuant to City Codified Ordinance §137.18. (*See* p. A15 of Petitioner's Appendix).

promote them to the position of lieutenant. The mayor had refused to make the appointments, claiming he was governed by the city's ordinances. Like Petitioner, the firefighters claimed that the ordinances were invalid under state law because the appointment process was not set forth in the city's *charter* and the mayor, therefore, had a duty to make the appointments under state civil service rules. The firefighters and their union filed a petition for writ of mandamus directly in the state court of appeals to require the mayor to make the appointments under state law. The court of appeals denied the writ after finding that the city's ordinances had been validly enacted under the charter and therefore superceded state law. The Ohio Supreme Court affirmed.

Not surprisingly, Shirokey has never articulated the due process to which he was entitled and of which he was deprived when the City allegedly "took" his property interest without due process of law. The Petition for Writ of Certiorari mentions, at page 13, that *if* Shirokey had been promoted (which he was not) and *if* the City Manager had demoted him (which he did not), he would have been entitled to a hearing after such a demotion. This required "process" would take place only if Shirokey had been promoted and later demoted and has absolutely nothing to do with the issue before the Court.

The Ohio Supreme Court's opinion which is the subject of Shirokey's Petition for Writ of Certiorari is absolutely on target in its analysis and is consistent with the holdings of this Court and the Sixth Circuit Court of Appeals. The Ohio Supreme Court first recognizes that Section 1983 is not a substitute for state remedies and may only be invoked when a *federal right* is violated.

[Opinion of Ohio Supreme Court, at pp. A6 and A7 of Petitioner's Appendix, *citing Monroe v. Pape*, 365 U.S. 167 (1961) and *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (citations omitted)]. It then addresses the issue of whether the right to a promotion rises to the level of a "fundamental" interest protected by substantive due process and it determines that it does not. [Opinion of Ohio Supreme Court, at pp. A8 - A9 of Petitioner's Appendix, *citing Bowers v. Hardwick*, 478 U.S. 186, 191-94, *reh'g denied*, 478 U.S. 1039 (1986) and *Michael H. v. Gerald D.*, 491 U.S. 110, 122, *reh'g denied*, 492 U.S. 937 (1989)]. Finally, the Court looks at a potential procedural due process claim and determines that "predeprivation process" would make no sense in the Shirokey situation and that the post deprivation remedies available were constitutionally adequate. [Opinion of Ohio Supreme Court, at pp. A11 - A16 of Petitioner's Appendix, *citing Zinermon v. Burch*, 494 U.S. 113, 125, 127 (1990) and *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (citations omitted)].

Petitioner Shirokey states three (3) reasons as to why the writ should be granted. The following deals, in turn, with each of Petitioner's assertions:

First, Petitioner asserts:

> The Ohio Supreme Court's decision that the Petitioner Shirokey did not have a constitutionally protected property interest in a promotion as a public employee is contrary to United States Supreme Court precedent.

[Petition for Writ of Certiorari, p. 9].

This "reason" is a total red herring. The Ohio Supreme Court never determined that Shirokey did not have a constitutionally protected property interest in a promotion. While the Court appropriately did not address the issue,[2] it did hold that even if he did have a property interest in the promotion, he would be required to establish a violation of due process in order to state a claim under 42 U.S.C. §1983. The Court's opinion very properly dealt exclusively with Shirokey's failure to establish a violation of his right to due process under the Fourteenth Amendment.

Second, Petitioner asserts:

> The Ohio Supreme Court's decision that the Petitioner's complaint failed to state a claim upon which relief can be granted under 42 U.S.C. §1983 for the violation of his procedural due process rights is contrary to the precedent of the United States Supreme Court.

[Petition for Writ of Certiorari, p. 16].

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[2]The Ohio Supreme Court has never held that a job promotion is a property right in Ohio. Other Ohio courts, however, have held that there is not a property interest in a promotion. *E.g., Lynch v. Tiffenbach*, 14 Ohio App. 3d at 178. Moreover, City Codified Ordinance §137.11 would require Petitioner to serve a probationary period in the promoted position during which he could be demoted at anytime without a right of appeal. (*See* City Codified Ordinance §137.11 at Appendix, p. A1). A probationary employee does not have a constitutionally protected property interest in his position. *See, e.g., Matulin v. Village of Lodi*, 862 F.2d 609, 615-16 (6th Cir. 1988); and *Hill v. Gatz*, 63 Ohio App. 2d 170, 176, 410 N.E.2d 1268, 1272 (1979). It is only logical that an *applicant* for a position, such as Petitioner Shirokey, can have no greater property interest by virtue of being an applicant than he would have in the position itself. *See, e.g., Ratajack v. Bd. of Fire and Police Commissioners of City of Calumet*, 729 F. Supp. 603, 607 (N.D.Ill. 1990).

Petitioner's argument under his second "reason" focuses primarily upon *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Zinermon v. Burch*, 494 U.S. 113 (1990). He argues that under these cases predeprivation due process is required, but he, again, fails to divulge what type of meaningful predeprivation due process could have been provided. Instead, he rails against the City for its "invidious legislation" [Petition for Writ of Certiorari, p. 19] -- presumably referring to the City's civil service rules -- and once more refers to state hearing requirements after demotion *if Shirokey had been promoted to the probationary position he was seeking.*

In point of fact, the reasoning of the U.S. Supreme Court in *Parratt*, 451 U.S. 527, *Hudson*, 468 U.S. 517, and *Zinermon*, 494 U.S. 113, is totally consistent with the reasoning and analysis of the Ohio Supreme Court in the present case. In each of these cases the essential issue was whether the process provided by the state was constitutionally adequate. In each case, the Court examined the facts of the particular situation to determine what procedural protections the Constitution requires. In *Zinermon*, the Court states: "Due process, as this Court often has said, is a flexible concept that varies with the particular situation." 494 U.S. at 127. The *Zinermon* Court goes on to state that "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due simply because they are the only remedies the State could be expected to provide." *Id.* at 128.

The present case involves a dispute over which civil service rules govern -- the City's rules or the statutes of the State of Ohio. It is a purely legal issue --

not a factual issue -- which no administrator or administrative body has the expertise or authority to determine. It would be irrational for the City or the state to provide a predeprivation hearing where an administrator or administrative body would be called upon to determine the legal validity of the City's rules, ordinances and Charter provisions. Therefore, the Ohio Supreme Court held that the state's postdeprivation judicial remedies are all the process that is due *in this situation* which is consistent with the reasoning of the U.S. Supreme Court in *Parratt*, *Hudson*, and *Zinermon*.

The result in *Zinermon*, 494 U.S. 113, is, of course, different from the present case, but the reasoning is consistent. Darrell Burch, the respondent in *Zinermon*, "consented" to be committed to a mental institution for a substantial period of time without any hearing to determine whether he was mentally capable of voluntarily giving such consent. The Court held that committing Zinermon without a determination as to whether his consent was informed was a violation of his constitutionally protected right to procedural due process. 494 U.S. at 139. It based this holding upon a finding that predeprivation safeguards in the *Zinermon* situation would have value in guarding against the kind of deprivation Burch allegedly suffered. *Id.* at 133-139. In other words, a reviewing authority could well have determined before Burch was committed that under the *facts* presented in that case he was not mentally capable of giving informed consent.

Using the same reasoning and analysis, the Ohio Supreme Court in the present case determined that a predeprivation hearing for Shirokey would have had no value in guarding against the kind of deprivation which

Shirokey alleges. The result is different from *Zinermon*, but the reasoning is consistent.

Other lower court cases are instructive here. In *Meyers v. City of Cincinnati*, 934 F.2d 726, 731 (6th Cir. 1991), the constructive discharge from employment of an assistant fire chief where he was not given a post-deprivation hearing required by Ohio statute did not violate the procedural due process clause of the Fourteenth Amendment and, therefore, was not actionable under 42 U.S.C. §1983 since he could not attack the State's judicial process for correction of errors by the administrative agency.

Buclary v. Borough of North Hampton (E.D.Pa. 1991), 1991 U.S. Dist. LEXIS 9897 (Case No. 90-7950) (unreported) involved a municipal corporation in Pennsylvania which failed to give veterans preference to candidates on an eligible list for police officer as required by state statute and if given would have assured plaintiffs' appointments. The court held such failure did not deprive plaintiffs of procedural due process under the Fourteenth Amendment and, therefore, was not actionable under Section 1983.

> [I]t seems absurd to require the defendants to afford pre-deprivation process under these circumstances. This Court is reluctant to find that due process requires the borough to afford candidates some sort of notice and hearing prior to the borough's decision to hire a candidate to the exclusion of others.

(See a copy of case in the Appendix hereto, pp. A2-A29).

Also in *Woods v. City of Michigan City*, 940 F.2d 275, 284 (7th Cir. 1991) (J. Will, concurring) it is stated:

> [W]here state action does not depend on predicate facts, or there are no disputed facts (and no disputes about the application of rules or policies to particular facts), generally no hearing is required. The due process clause does not mandate procedure for its own sake. Due process of law means an opportunity to be heard sometimes in person, sometimes on paper, sometimes before the fact [citation omitted], sometimes after [citation omitted], in cases where there is something to be heard about.

A predeprivation hearing would not have served any useful evidentiary purpose in this case where a police officer detained a traffic misdemeanant in clear violation of state law.

Likewise, a predeprivation hearing would not have served any useful purpose in the case at bar.

Third, Petitioner argues:

> The Ohio Supreme Court's decision in this case is contrary to the laws of the United States and the precedent of the Supreme Court of the United States so as to have an adverse and chilling effect upon the rights of United States citizens who have a legitimate claim and attempt to bring an action under 42 U.S.C. §1983 in Ohio.

[Petition for Writ of Certiorari, p. 22].

Under his third "reason" Petitioner merely restates arguments made under "reasons" one and two above and states that denying Petitioner's claim would have a "chilling effect" on persons who might otherwise seek relief under 42 U.S.C. §1983.

This Court and the federal circuit courts around the country have indicated on numerous occasions that 42 U.S.C. §1983 was not intended to be a substitute for state remedies. This Court articulated its position on the issue in *Parratt v. Taylor*, 451 U.S. at 544, as follows:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed. 2d 405, 96 S.Ct. 1155, 1160 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Likewise, Petitioner's reasoning "would make of the Fourteenth Amendment a font" of substantive state civil service law and municipal "home rule" law. To put a "chill" on the inclination of litigants to file almost any action against government under the cloak of 42 U.S.C. §1983 would not be contrary to sound public policy or the precedents of this Court.

CONCLUSION

Shirokey v. Marth involves primarily issues of Ohio state law dealing with the relationship, under the Ohio Constitution, of municipalities and state government and the complex concept of municipal "home rule". For reasons best known to his attorneys, Petitioner brought his claim under 42 U.S.C. §1983. The federal constitutional issues raised -- violation of due process -- are purely incidental to the central issues of the original case and the holding of the Ohio Supreme Court did not break new ground or take a position contrary to the precedents of this Court in finding that no claim was stated under 42 U.S.C. §1983. It is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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and
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APPENDIX

CITY OF CLEVELAND HEIGHTS CODIFIED ORDINANCE §137.11

137.11 APPOINTMENTS, PROMOTIONS AND PROBATION.

All appointments and promotions by the City Manager in the classified service of the City shall be for a probationary period of twelve (12) months, except that the probationary period for an original appointment to the classified position of Firefighter in the Division of Fire shall be for a probationary period of twenty-four (24) months. No appointment or promotion therein shall be final until the employee has served and completed his probationary period in a satisfactory manner. An employee of the classified service of the City so appointed or promoted shall be subject to removal as a new employee or demoted as a promoted employee by the City Manager at any time during the probationary period, without appeal to the Civil Service Commission, if the City Manager determines that services and performance of the employee during such probationary period are unsatisfactory. Appointments or promotions in the classified service of the City shall become final at the end of the probationary period.

JAMES BUCLARY, JOSEPH YORK and RICHARD SUPPAN V. BOROUGH OF NORTHAMPTON and PAUL KUTZLER

Civil Action No. 90-7950

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
1991 U.S. Dist. LEXIS 9897

July 15, 1991, Decided
July 17, 1991, Filed

COUNSEL: [*1]

RICHARD J. ORLOSKI, ALLENTOWN, PENNSYLVANIA, FOR PLAINTIFF. .

R. MICHAEL CARR, PHILADELPHIA, PENNSYLVANIA, FOR DEFENDANT.

JUDGES: Edward N. Cahn, United States District Judge.

OPINION BY: CAHN

OPINION: MEMORANDUM

The plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 n1 alleging that the defendants denied them employment with the Borough Police force in a manner violative of their federal constitutional rights.

Richard Suppan also brought a pendant state claim alleging defamation on the part of both defendants. The defendants now move for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. BACKGROUND

Before advancing to the plaintiffs' claims, some background concerning the Borough's hiring process is necessary for an understanding of the dispute. When the Borough Council ("Council") decides to hire a police officer, it requests a certified list of three eligible candidates from the Borough's Civil Service Commission ("Commission"). If the Council chooses to appoint someone for a vacant position, the appointment must be from the certified list. The Commission generates lists of eligible candidates through an application process in which candidates are tested and ranked. [*2] The Commission's testing process requires the applicants to undergo oral and written examinations. The Commission then marks and subsequently averages the examinations to obtain raw scores by which the applicants are ranked from highest to lowest. The Pennsylvania Veterans' Preference Act n2 ("V.P.A.") entitles any veterans of the United States military to have ten extra "preference points" added to their scores before being ranked. Generally, applicants must then take a pass/fail psychological examination which the applicants must pass to continue their eligibility. Thus, when the Borough Council requests a certified list, the Commission forwards to the Council the names of the three highest-ranked applicants on the eligibility list.

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n1 Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [*3]

n2 51 Pa. C.S. §§ 7101-04.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - -

The plaintiffs James Buclary ("Buclary"), Joseph York ("York"), and Richard Suppan ("Suppan") are Pennsylvania residents. The defendant Borough of Northampton ("Borough") is a municipal corporation organized under the laws of Pennsylvania and located in Northampton County, Pennsylvania. The defendant Paul Kutzler ("Kutzler") at all relevant times was the Mayor of the Borough of
Northampton.

In early 1990, two vacancies arose in the defendant Borough's police force. The Borough then requested a certified list of eligible candidates from the Commission. On or about February 22, 1990, the plaintiffs took the civil service examination, and each claimed to be "veterans" as contemplated by the Veterans' Preference Act. The plaintiffs each had the ten "preference points" added to their examination results, and the top five applicants, ranked In order, were: (1) York; (2) Suppan; (3) Buclary; (4) Mullner, John J.; (5) Kadingo, Brian D.

The plaintiffs subsequently took a psychological examination, which each plaintiff passed. The Commission erroneously disqualified Suppan and [*4] removed him from the eligibility list, because it was the Commission's belief that Suppan failed this test. Zarayko Affidavit, para. 11. The Commission eventually rectified this error upon Suppan's appeal on November 27, 1990.

On or about April 19, 1990; the Commission supplied the Borough Council with a certified list of the three highest-ranked candidates. The candidates, listed and ranked in order, were York, Buclary and Mullner (who ranked third because of Suppan's erroneous disqualification). The Borough appointed Mullner to the position. Similarly, on May 10, 1990, the Commission generated a second certified list. The candidates, listed and ranked in order, were York, Buclary, and Kadingo. The Borough filled the second vacancy with Kadingo.

The plaintiffs now claim that they have a legal entitlement to the patrol officer positions by virtue of their placement on the eligibility list, and that the defendants denied them these positions in violation of the V.P.A. and without due process of law. The plaintiffs also claim that the defendants refused to hire them because they were not born and raised in the Lehigh Valley or in the Borough of Northampton. Richard Suppan also claims [*5] damages for defamation, alleging that the defendants intentionally caused the publication of statements that Suppan had failed his psychological examination. The plaintiffs now seek: compensatory damages from both defendants for emotional distress, loss of reputation, anxiety, humiliation and sleeplessness; punitive damages from the defendant Kutzler for an intentional, willful and wanton

invasion of rights; punitive damages from both defendants on the pendant state claim; and an order appointing them to the patrolman positions with "make whole" relief including seniority, back pay, benefits, Interest, costs and fees or, in the alternative, compensatory damages for loss of past and future income and benefits.

II. DISCUSSION

It, is important to note that all three plaintiffs are not similarly situated. Because the Commission did not certify Richard Suppan to the Council, the Council had no authority to hire him. As a result, Suppan's claims are slightly more involved than those of the other plaintiffs, and this court will consider them separately where necessary.

A. Standard for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to [*6] interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of "showing -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Vines v. Howard*, 676 F. Supp. 608, 610 (E.D. Pa. 1987). The non-moving party must then go beyond the pleadings to "establish the existence of each element on which it bears the burden of proof." *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3rd Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S. Ct. 1313 (1991),

because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. In deciding the defendants' motion for summary judgment, this court must view the facts in the light most favorable to the plaintiffs, *Lyons v. U.S. Marshals*, 840 F.2d 202, 204 (3rd Cir. 1988), [*7] drawing all inferences and resolving all conflicts in their favor. *Gans v. Mundy*, 762 F.2d 338, 340 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1010 (1986).

B. The Plaintiffs' Due Process Claims

The plaintiffs allege that the Pennsylvania Veterans' Preference Act gives them a "legal entitlement" to the police officer positions and that the defendants' "refusal to hire all three plaintiffs deprives each plaintiff of his constitutional right to substantive due process." Complaint, paras. 25-26. Construing the plaintiffs' claims liberally, this court finds that the complaint alleges both procedural and substantive due process claims. Thus, this court will examine each in turn.

1. Procedural Due Process Claims of Buclary and York

The "procedural component" of the Due Process Clause protects against government effected deprivations of constitutionally protected "life, liberty, or property" interests without constitutionally adequate process. *Zinermon v. Burch*, 494 U.S. 113, _____, 108 L. Ed. 2d 100, 114-15 (1990). Buclary and York allege that the defendants deprived them of appointments to which they were legally entitled. [*8] Therefore, their claim depends on their having had a constitutionally protected "property" interest in the appointments. *Cleveland Bd. of*

Education v. Loudermill, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*; 408 US. 564, 576-578 (1972). If such a right exists, the defendants cannot deprive the plaintiffs of this right without "constitutionally adequate" process. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 114 (1990); *Loudermill*, 470 U.S. at 538; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)

State law creates and defines property rights. *Loudermill*, 470 U.S. at 538; *Craft*, 436 U.S. at 9. Buclary and York claim that the V.P.A. gives them a property interest in the patrolman positions. n3 Therefore, this court must first examine the V.P.A. to determine the nature of the interests it creates. *Loudermill*, 470 U.S. at 538; *Roth*, 408 U.S. at 577; *Clark v. Township of Falls*, 890 F.2d 611, 617 (3rd Cir. 1989). The next determination is whether the interests rise to a "legitimate claim [*9] of entitlement" protected by the Due Process Clause of the Fourteenth Amendment. *Craft*, 436 U.S. at 9; *Clark*, 890 F.2d at 617.

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n3 The defendants argue that this court should abstain from considering the statute pursuant to the doctrine of *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). Pullman abstention recognizes that in some exceptional cases, unsettled questions of state law require that this court defer to a policy of promoting comity with the state courts, a policy which directs the federal courts to "stay their hands, at least initially." *Hughes v. Lipscher*, 906 F.2d 961, 964 (3rd Cir. 1990). "Abstention is invoked to allow a state judiciary to construe statutes or statutory schemes which appear constitutionally problematic on their face, but which may be subject to a saving construction." *Georgevich v.*

Strauss, 772 F.2d 1078, 1091 (3rd Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1028 (1986). Although the abstention decision is within that court's discretion, there are three prerequisite elements that must be present in this case before this court considers it further:

(1) Uncertain issues of state law underlying the federal constitutional claims brought in the district court;
(2) Amenability of the state law issues to a state court interpretation that would obviate the need for, or substantially narrow, adjudication of the federal claims;
(3) Disruption of important state policies through a federal court's erroneous construction of state law.

Hughes; 906 F.2d at 964; *Beigenwald v. Fauver*, 882 F.2d 748, 750 (3rd Cir. 1989); *D'Iorio v County of Delaware*, 592 F.2d 681, 685-86, *overruled on other grounds, Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3rd Cir. 1982) (en banc). Because the Veterans Preference Act does not present "uncertain issues of state law," this court finds that abstention is inappropriate.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

[*10]

Section 4(b) of the V.P.A., 51 Pa. C.S. § 7104(b), states:

Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as a result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a position shall give preference to such soldier,

notwithstanding, that his name does not stand highest on the eligible or promotional list.

(emphasis added). Although the Pennsylvania legislature originally enacted the V.P.A. in 1941, the grant of preference to veterans in civil service appointments/promotions has a longer history. The first relevant construction of a veterans' preference provision appears in *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A.2d 701 (1938). n4 The *Graham* court's consideration yielded this construction:

Our conclusion from these decisions is that, so long as the statute requires passage of the examination, a veteran may be constitutionally preferred over non-veterans whether the statute be mandatory or directory. In either case the minimum qualification for appointment is success [*11] in an examination. The provision that those in the first four of the eligible list shall be preferred must, however, be construed to be mandatory, with the exception that the appointing power need not select such veteran if it is found on a fair basis that he is morally or physically unfit to be employed.

Graham, 333 Pa. at 577, 3 A.2d at 706. The Commonwealth Court has recently reaffirmed this mandatory construction. In *Rasmussen v. Borough of Aspinwall*, 103 Pa. Commw. 109, 519 A.2d 1074, *appeal granted*, 516 Pa. 637, 533 A.2d 94 (1987), *appeal withdrawn*, March 9, 1988, the plaintiff, who was applying for a patrolman position, received the veterans' preference points and as a result ranked first out of the three candidates certified to the Borough Council by the civil service commission. Rasmussen was the only veteran on the list, but the Borough selected a non-veteran who ranked below Rasmussen. The Commonwealth Court reversed the

trial court's grant of summary judgment for the Borough and remanded it with directions to enter judgment in favor of Rasmussen. In reaching this decision, [*12] the *Rasmussen* court held that:

Section 7104(b), by use of the word "shall", commands Council to appoint the certified veteran if he or she is one of the three on the certified list. It is also clear that the Borough Code defers to the Veterans' Preference Act. n5 Section 1181 n6 of the Code reads . . . "[persons who are eligible] shall be given the additional credits and preference in appointment and promotion as provided by law."

Rasmussen, 103 Pa. Commw. at 113-14, 519 A.2d at 1076 (emphasis in original). Thus, Section 4 of the V.P.A. mandates that if the Borough appoints a police officer from a certified eligible list comprised of one or more otherwise qualified veterans as contemplated by the statute, the Borough must appoint a veteran.

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n4 The *Schmid* court construed the Third Class City Law, 53 P.S. § 12198-4407 (June 23, 1931). This section also provided that "preference in appointment shall be given."

n5 "We note that Sections 1181 and 1184 of the Borough Code were both originally enacted as a part of the Borough Code in 1947 and were re-enacted with substantially the same language in 1966. It is clear, therefore, that the legislature since 1947 intended that

the Borough Code recognize whatever the existing law in Pennsylvania is with regard to veterans' preference." (footnote in original). [*13]

n6 53 P.S. § 46181.

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Accordingly, the plaintiffs Buclary and York, by virtue of their inclusion on the certified list, have a "property" interest in the appointments. This court finds that these interests, as created and defined by the state, rise to the level of a "legitimate claim of entitlement" and, therefore, are "property" protected by the Due Process Clause. *See Loudermill*, 470 U.S. at 538-39 (statute providing for termination of civil service employees only for cause created a property interest in continued employment). Also, it is clear that the defendants' appointment of two non-veterans, under color of state law, functioned to deprive Buclary and York of their entitlements.

However, this court's inquiry into the plaintiffs' claim does not end here. The next step of the analysis is the determination of what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court has recently stated:

The constitutional violation [of procedural due process rights] actionable under § 1983 is not complete when the deprivation occurs; it is [*14] not complete unless and until the state fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process [was] provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards

built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon, 494 U.S. at _____, 108 L. Ed. 2d at 114. In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court enunciated the factors this court must weigh to determine what protection due process requires:

First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court has usually held that the [*15] Constitution requires some kind of notice or hearing prior to a deprivation of property. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 115 (citations omitted). However, the Court has also recognized that, under certain circumstances, a postdeprivation remedy satisfies due process. *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds*, 474 U.S. 327 (1986). The *Parratt* rule does not function as an exception to the *Matthews* analysis. Rather, the *Parratt* rule recognizes that in certain situations, tortious deprivations of property may occur "as a result of a random and unauthorized act of a state employee . . . not a result of some established procedure." *Parratt*, 451 U.S. at 541. Because the state cannot predict "random and unauthorized" deprivations, the "value of predeprivation safeguards [are] negligible in preventing the kind of depri-

vation at issue." *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 116.

The plaintiffs urge that due process requires notice and an opportunity to be beard prior to the deprivation of their entitlements. n7 Applying the *Matthews* factors, this court finds that [*16] the private Interest affected is substantial -- the interest in obtaining employment and earning a livelihood. Second, the risk of erroneous deprivation is small. The Borough's appointment process probably effects a deprivation of a vested employment interest very rarely. This claim differs greatly from most property deprivation cases where the government act at issue involves procedures or functions designed to effect the deprivation. *See Loudermill*, 470 U.S. at 539 (termination procedures at issue effected a deprivation); *Zinermon*, 494 U.S. at ____, 108 L. Ed. 2d at 118 (admission to mental hospital effected a deprivation). This case involves hiring procedures which only under certain circumstances -- the presence of veterans on the certified list and the failure to appoint one effects an incidental *de facto* deprivation. This court has difficulty in thinking of an appropriate procedure that would provide candidates with notice and a hearing prior to an appointment; at least not one which is practical considering the small risk of incidental deprivation. Granted, any additional or substitute procedures could conceivably eliminate deprivations, but the administrative [*17] and fiscal costs would be disproportionately burdensome relative to the small number of erroneous deprivations.

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n7 The plaintiffs compare themselves to the police officers in *Gniotek v. Philadelphia*, 630 F. Supp. 827 (E.D.

Pa. 1986). In *Gniotek*, nine police officers were dismissed from the police force. The issue was whether the predeprivation process afforded to the plaintiffs was constitutionally adequate. Holding that it was, Judge Broderick noted that the city had afforded notice and explanation of the charges, an opportunity to respond, and a post-termination hearing. *Gniotek*, 630 F. Supp. at 834. However, *Gniotek* is easily distinguishable. First, this court declines to consider the plaintiffs as public employees with a property interest in their continued employment. *See Gniotek*, 630 F. Supp. at 833; *see also Loudermill*, 470 U.S. 538-39 (public school employees have a property right in continued employment which requires predeprivation process). Second, *Gniotek* involved the adequacy of termination proceedings that function to effect a deprivation; this case involves hiring procedures which incidentally (whether intentionally, arbitrarily or inadvertently) caused a deprivation.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -
[*18]

Nonetheless, the Fourteenth Amendment requires that the plaintiffs receive constitutionally adequate process. Initially, this court notes that Buclary and York have a meaningful postdeprivation remedy. In *Rasmussen v. Borough of Aspinwall*, the Commonwealth Court awarded the plaintiff a patrolman appointment with seniority and back pay. 103 Pa. Commw. at 116, 519 A.2d at 1077. Thus, *Rasmussen* would serve as direct precedent had the plaintiffs brought suit in state court. However, a meaningful postdeprivation remedy could serve to undermine the plaintiffs' claim only if predeprivation procedure is not a constitutional requirement. The *Parratt* rule addresses this contingency.

Because this case is of such a unique nature, the facts do not easily lend themselves to a *Parratt* analysis. In *Parratt* a state prison employee negligently lost a prisoner's sail-order hobby kit. The prisoner alleged that the state deprived him of his property without due process of law. The Supreme Court held that because the state could not predict "random and unauthorized" deprivations by an employee, it was not in a position to provide any predeprivation process. [*19] *Parratt*, 451 U.S. at 541. The Court found that the prisoner had an a constitutionally adequate postdeprivation tort remedy at state law, which was the only process the state could provide under those circumstances. *Id.*

The case at bar differs from *Parratt*, because this case does not involve an act by an employee which the Borough could not foresee; it involves acts of the Borough Council. The Council, through an established procedure, makes decisions to appoint some candidates to the exclusion of others. Therefore, "any erroneous deprivation will occur, if at all, at a specific, predictable point in the hiring process" -- when the Council makes its selection from the certified list. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 121. Also, unlike the Court in *Parratt*, this court cannot say that predeprivation process is impossible. *Id.* Indeed, an analysis under *Matthews* suggests that a prior hearing might have prevented the deprivation. Lastly, the defendants' actions were not "unauthorized" in the sense that *Parratt* requires. The defendants were "authorized" to make final appointment decisions. The plaintiffs allege that the defendants [*20] did so with intentional and reckless disregard for their rights. Thus, "the deprivation here is 'unauthorized' only in the sense that it was an act not sanctioned by state law, but, instead, was a 'deprivation of constitutional rights by an official's abuse of his position.'"

Zinermon, 494 U.S. at _____, 108 L. Ed. 2d at 122. Accordingly, this case falls outside the scope of the *Parratt* rule.

However, as this court's analysis under the *Matthews* factors suggests, it seems absurd to require the defendants to afford predeprivation process under these circumstances. This court is reluctant to find that due process requires the Borough to afford candidates some sort of notice and hearing prior to the Borough's decision to hire a candidate to the exclusion of others. Although *Parratt* clearly does not control, *Parratt*'s underlying rationale suggests that due process does not require the aforementioned result.

The *Parratt* Court recognized that notice and an opportunity to be heard "must be granted at a meaningful time and a meaningful manner." *Parratt*, 451 U.S. at 540. Although the Fourteenth Amendment usually requires predeprivation process, the [*21] Court has consistently tempered this requirement with the caveat that "due process . . . is a flexible concept that varies with the particular situation." *Zinermon*, 494 U.S. ____, 108 L. Ed. 2d at 114-15. In *Parratt* the Court surveyed a long line of prior decisions which indicated that "the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful [postdeprivation process], satisfy the requirements of procedural due process." 451 U.S. at 539. This recognition significantly predates the *Parratt* rule. *Id.* (citations omitted). Sixty years ago, Justice Brandeis opened that "where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931);

Accord, Parratt, 451 U.S. at 537; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974).

Considering *Phillips'* language and the Supreme Court's consistent reliance on it, the Constitution does not necessarily [*22] require predeprivation process In the case at bar. An application of the *Matthews* factors indicates that the impracticality of providing predeprivation process in this case mandates the flexible approach the Supreme Court repeatedly advocates.

Although the *Parratt* rule does not control the instant case, *Parratt* does not preclude a finding that a meaningful postdeprivation remedy provides Buclary and York with constitutionally adequate process. The Commonwealth Court in *Rasmussen* directly addresses this type of deprivation and explicitly recognizes the equitable and "make whole" relief that the plaintiffs request. This court holds that *Rasmussen's* postdeprivation remedy satisfies the requirements of procedural due process and, therefore, Buclary and York have failed to state a § 1983 claim. Accordingly, there are no material facts to be disputed, and the defendants are entitled to summary judgment on this issue with respect to York and Buclary.

2. Procedural Due Process Claim of Suppan

Because Suppan was not certified to the Borough Council by the Civil Service Commission, his claim is of a different nature. Suppan alleges that although he actually passed the psychological [*23] test, the defendants did not inform his of his "failure" prior to the appointments of Mullner and Kadingo. Suppan affidavit, para. 5. Thus, he claims, the defendants failed to afford him notice and an opportunity to be heard on

the issue before disqualifying him. As noted above, Suppan appealed to the Commission and subsequently regained his position on the eligibility list. Thus, the issue is whether Suppan had a property right to placement on the eligibility list by ranking second after the written and oral examinations. Such a right, if it exists, can be found in the Borough's Civil Service Rules, Ordinance 941.

> The Civil Service Commission shall establish a list containing the names of those candidates still eligible for appointment to the position which is to be filled. The names of the candidates on the eligibility list shall be ranked according to the total scores of the candidates. From the eligible list, the Civil Service Commission shall certify to Borough Council . . . the names of the three candidates with the highest total scores if the position to be filled is any rank other than the chief of police.

Borough Ordinance No. 941, § 602(f) (emphasis added). [*24] The mandatory nature of this section suggests that the second-ranked Suppan had a right to remain on the eligible list contingent on his receiving an "passing grade" in pass/fail physical and psychological examinations. *Id.* at § 602(e). It is undisputed that Suppan passed these tests and was therefore eligible for appointment. In determining whether or not this ordinance creates a constitutionally-protected property right, this court finds that a Third Circuit Court of Appeals decision is directly applicable.

In *Stana v. School Dist. of Pittsburgh*, 775 F.2d 122 (3rd Cir. 1985), the plaintiff Stana was certified on a list used by the school district to select instructors. The *Stana* court held that the plaintiff had a legitimate claim

of entitlement to remaining on the eligible list based on testimony that the school district had a policy of keeping eligible persons on the list for "at least two years." *Id.* at 126. On the basis of this precedent, this court has little trouble finding that Suppan's eligibility gave him a legitimate claim of entitlement to remaining on the eligible list and to be subsequently certified to the Borough Council [*25] based an his test ranking.

The next question is whether the defendants deprived Suppan of this entitlement without due process. It is undisputed that the Commission rectified its error at Suppan's November 1990 appeal, but Suppan claims that due process requires the Borough to afford him notice of his failure and an opportunity to be heard an the issue before he was removed from the eligibility list. Again, *Stana* is instructive. In *Stana*, a school district administrator removed the plaintiff from the eligibility list after learning that the plaintiff received a negative performance evaluation from another employer. Judge Sloviter held that the school district must afford Stana notice of the removal and an opportunity to address the negative evaluation. *Stana*, 775 F.2d at 129. An application of the *Matthews* factors dictates the same result here.

> It is clear that like the plaintiff in *Stana*, Suppan has a significant private interest in obtaining gainful employment. With respect to risk of erroneous deprivation, this court can give no opinion. It is not established in the pleadings or the affidavits whether the error resulted from a flaw in the [*26] test itself, an error in evaluating the results, or some clerical error. However, the value of administrative safeguards is clear. The Borough can avoid erroneous deprivations by notifying the

candidate that he or she failed the test and allowing the candidate to appeal the finding. Although the Borough affords candidates process in the form of a civil service appeal, this process is not so meaningful when it occurs after the candidate has lost two opportunities to be considered for appointment. Thus, the Borough's procedure for redress of these deprivations must occur for to the candidate's removal from the eligibility list. Accordingly, Suppan has stated a § 1983 claim for a violation of his right to procedural due process. Because the defendants have attempted no showing of an absence of any genuine issues of material fact, the defendants' motion for summary judgment is dented with respect to this claim.

3. Substantive due process

Generally, substantive due process claims must demonstrate that the plaintiff was deprived of a "right historically and traditionally protected against State interference." *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. ____, _____, 111 L. Ed. 2d 224, 252 (1990) [*27] (Scalia, J., concurring); *Michael H. v. Gerald D.*, 491 U.S. 110, _____, 105 L. Ed. 2d 91, 105 (1989) (plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *Moore v. East Cleveland*, 431 U.S. 494, 502-03, (1977) (plurality opinion). Public employment, however, is not a constitutional right. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273, (1979). Thus, the plaintiffs have no claim on that basis.

In *Zinermon v. Burch*, the Supreme Court mentions a "substantive component" of the Due Process Clause which bars "arbitrary, wrongful government actions" regardless of procedural adequacy. n8 494 U.S. at ____.

108 L. Ed. 2d at 114-15. However, "whether and when state created property interests invoke substantive due process concerns" has not been squarely addressed by the Supreme Court. *Reich v. Beharry*, 883 F.2d 239, 243 (3rd Cir. 1989). In *Regents of the Univ. Of Mich. v. Ewing*, 474 U.S. 214 (1985), the Court assumed arguendo that Ewing had a protected property interest in her continued enrollment in school and found that [*28] "even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of this record disclose no such action." 474 U.S. at 223.

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n8 The plaintiffs have not alleged "arbitrary and capricious" conduct on the part of the defendants. The plaintiffs allege a "reckless disregard" of their rights, and this court construes the plaintiffs complaint to allege "arbitrary and capricious." Complaint, para. 25.

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The circuit courts have taken different stances since the Supreme Court's decision in *Ewing*. Several circuit courts have interpreted *Ewing* to hold that an arbitrary and capricious deprivation of state-created entitlements implicates substantive due process concerns. *See Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571, 1577 (11th Cir. 1983) (where property interest exists for the purposes of procedural due process, it also exists for substantive due process); *see also* [*29] *Moore v. Warwick Public School Dist. No. 29*, 704 F.2d 322, 329-29 (8th Cir. 1986) (substantive due process claim stated where "arbitrary and capricious state action" alleged

regarding an interest in continued employment); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1484-85 (9th Cir. 1989) (substantive due process is violated when property rights are subject to arbitrary or malicious use of government power). However, other circuit courts have been reluctant to allow substantive claims based an state-created property rights. *See Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988) (no substantive due process claim where a state-created property interest is at stake and the state affords an adequate remedy); *see also Schaper v. City of Huntsville*, 813 F.2d 709, 718-19 (5th Cir. 1987) (where claim is barred under *Parratt v. Taylor* because act complained of is "random and unauthorized," plaintiff cannot state a claim for a violation of substantive due process).

The Court of Appeals for the Third Circuit has been similarly reluctant and has given little direct guidance [*30] for this court's analysis. In *Reich v. Beharry*, Judge Stapleton held that "despite the importance of utility service to the maintenance of a minimally acceptable standard of living, an arbitrary and capricious termination of such service by a state actor does not give rise "to a substantive due process claim." 883 F.2d at 242: *See Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3rd Cir. 1988) (water and sewer service did not constitute a protected property Interest for the purposes of substantive due process); *see also Mauriello v. U. of Med. and Dentistry of N.J.*, 781 F.2d 46, 52 (3rd Cir.), *cert. denied*, 479 U.S. 818 (1986) (student dismissed with constitutionally adequate procedures failed to state a substantive due process claim). The *Mauriello* and *Reich* courts were hesitant to recognize substantive due process claims based on an interest that "bears little resemblance to the fundamental interests that previously

have been viewed as implicitly protected by the Constitution." *Mauriello*, 781 F.2d at 50 (*citing Ewing*, 474 U.S. at 239-40 (Powell, J. concurring)); [*31] *Reich*, 883 F.2d at 244. Similarly, the interests in this case bear little resemblance to any implicitly protected rights.

Thus, this court will dismiss the claim. Despite the vested nature of both the Buclary/York and Suppan entitlements, and with due regard to their important interests in obtaining gainful employment, this court declines to hold that arbitrary and capricious deprivations of these particular state-created property rights give rise to a substantive due process claim. Therefore, because the plaintiffs have failed to state a claim for a violation of substantive due process, it follows that there are no material facts to be disputed. Accordingly, the defendants are granted summary judgment an this issue with respect to all of the plaintiffs.

C. The Plaintiffs, Equal Protection Claim

The plaintiffs claim that the defendants denied them employment, because they were not "born and raised in the Lehigh Valley or Northampton, Pennsylvania." In support of this allegation, the plaintiffs have offered affidavits claiming that each plaintiff was told by either the Chief of Police or a Civil Service representative that he was not being hired because he was [*32] not a 'local' and that the Borough 'takes care of its own' and hires only local people. In their response to the defendants' motion, the plaintiffs argue both an impermissible burden on the right to interstate travel and impermissible residency requirements. n9

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n9 Initially, this court notes that the Borough has a codified residency requirement. Although the plaintiffs do not challenge it directly, this court notes that it is a prospective one which conditions only continued employment upon the establishment of residence in the Borough. Such requirements have been upheld as constitutional. *See McCarthy v. Philadelphia*, 424 U.S. 645 (1976).

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Generally, the right to interstate migration and travel is a basic federal constitutional guarantee, *Memorial Hospital v. Maricopia County*, 415 U.S. 250, 255 (1974), which "protects against any unreasonable burden on citizens who travel from state to state." *Philadelphia Lodge No. 5 v. City of Philadelphia*, 599 F. Supp. 254, 259 (E.D. Pa. 1984), [*33] *aff'd without published opinion*, 779 F.2d 43 (3rd Cir. 1985) (*citing Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969)). Because this right is fundamental, any abridgement of it triggers strict judicial scrutiny and, therefore, must be justified as necessary to promote a compelling governmental interest. *Memorial Hospital*, 415 U.S. at 253; *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court addressed the constitutionality of a one-year waiting period for the receipt of welfare benefits. The *Shapiro* Court held that the waiting period burdened the right "to migrate, settle, find a new job and start a new life." 394 U.S. at 629. *Memorial Hospitals*, 415 U.S. at 255. The defendants seek to distinguish durational residency requirement cases such as *Shapiro*,

because the "birthplace" discrimination alleged in this case would not burden the right to travel. The defendants argue that a person's birthplace is unalterable and, thus, does not affect interstate mobility as does an unreasonable durational [*34] residency requirement. This court disagrees.

Although the facts of *Shapiro* and its narrow holding are entirely distinguishable from this case, it is clear from *Shapiro* that the plaintiffs have an "unconditional personal right" to move from their state of birth and establish a life in another state. *Dunn*, 405 U.S. at 341 (*quoting Shapiro*, 394 U.S. at 643, (Stewart, J., concurring)). The discrimination alleged in this case functions to divide Borough residents into two classes: those born and raised in the Lehigh Valley and those who subsequently migrate there. Thus, assuming the plaintiffs' allegations are true, the discrimination acts as an uncodified residency requirement that the plaintiffs Buclary and York can never meet. The fact that the discrimination is based on an immutable characteristic such as state of birth does not serve to remove this case from the protection of the right to travel; to the contrary, it adds a certain measure of invidiousness which offends "the principle that individuals should not be discriminated against on the basis of traits for which they bear no responsibility." *Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235, 1243 (3rd Cir. 1978), [*35] *vacated on other grounds*, 442 U.S. 366 (1979). *Accord, Frontiers v. Richardson*, 411 U.S. 677, 686-87 (1973).

Turning to the specific facts of this case, this court finds that the plaintiffs York and Buclary allege facts sufficient to state a claim for the violation of their right to travel. The defendant Borough's employment

application requests the applicant's city and state of birth, and the plaintiffs York and Buclary listed their places of birth as New York and New Jersey, respectively. The defendants passed over the higher-ranked, "non-local" plaintiffs and appointed Mullner and Kadingo, who were both born in Allentown, Pa. Therefore, there remain some genuine issues of material fact, particularly whether or not the defendants made the assertions concerning the alleged preference in hiring "local" candidates. Consequently, the defendants' motion for summary judgment with regard to the plaintiffs York and Buclary is dented.

With respect to the remaining plaintiff, this court notes that Richard Suppan was born and raised in Allentown, Pa. Because he is similarly situated to Mullner and Kadingo, he cannot claim that he was discriminated against [*36] because he was not a "local". Therefore the defendants' motion for summary judgment is granted with respect to Suppan.

D. Suppan's Defamation Claim

The plaintiff Suppan alleges that the defendants defamed him by issuing written and oral statements that he "failed" the psychological examination. The defendants assert that Suppan's pendant defamation claim is barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8540-50. Under this statute, the plaintiff's claim is barred unless it falls under the "willful misconduct" exception to governmental immunity. Section 8550 waives immunity,

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that

the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct.

In the context of § 8550, "willful misconduct" is coextensive with the common law definition of "intentional tort". *Lancie v. Giles*, 132 Pa. Commw. 255, 261, 572 A.2d 827, 830 (1990). In his complaint Suppan alleges that the "defendants intentionally, [*37] maliciously, and recklessly caused . . . malicious, false, defamatory, slanderous and libelous statements to be published and circulated." Complaint, paras. 48-49. The plaintiff's allegations are sufficient to state a claim under the "willful misconduct" exception to governmental and official Immunity. Because the defendants have not demonstrated an absence of any genuine issues of material fact with regard to this claim, their motion for summary judgment on Suppan's defamation claim is denied.

An order follows.

ORDER

AND NOW, upon consideration of the defendants' motion for summary judgment, IT IS ORDERED that the motion,

1. with respect to the procedural due process claims of the plaintiffs Buclary and York, is GRANTED.

2. with respect to the procedural due process claim of the plaintiff Suppan, is DENIED.

3. with respect to the substantive due process claims of all plaintiffs, is GRANTED.

4. with respect to the equal protection claims of the plaintiffs York and Buclary, is DENIED.

5. with respect to the equal protection claim of the plaintiff Suppan, is GRANTED.

6. with respect to the plaintiff Suppan's pendant defamation claim, is DENIED.

Supreme Court, U.S.
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No. 92-71

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Other Authorities

City of Cleveland Heights Codified Ordinance §137.11 6

No. 92-71

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

The Petitioner has stated and demonstrated a valid claim under 42 U.S.C. §1983. The Petitioner all along has attacked the Respondent city's established procedure under which he was denied his promotion as being invalid and thus instrumental in denying him

the constitutional due process which would have been afforded him under the Ohio state civil service statutes. Therefore, the Petitioner has claimed that it is the procedure, itself, which is defective, not the failure of city officials to act pursuant to a valid city procedure. By not taking notice of this fact, both the Respondent and the Ohio Supreme Court have made a mistake in their reasoning that has led to this incorrect decision.

The established procedure of the Respondent is of no legal effect. While it is true that the Ohio Supreme Court never reached this issue in its decision, the validity of the rule has already been decided by the court. The Ohio Supreme Court in *State, ex rel. Habe v. South Euclid*, 56 Ohio St. 3d 117 (1990), unanimously held a nearly identical rule under identical circumstances to be invalid. *Habe*, a *per curiam* decision, is exactly on point and unless the doctrine of *stare decisis* is no longer viable, which is not the case, it can be conclusively stated that the Respondent's rule—the established procedure—is invalid and state statute is the applicable standard. *Id.* Since the Petitioner is claiming that the established procedure, itself, not the manner in which it was applied, operated to cause the deprivation, adequacy of state post-deprivation procedure is irrelevant.

An excellent example of when the availability of adequate state post-deprivation procedure is irrelevant is when a procedural due process claim is founded upon a flawed established procedure, as in *Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985); *cert. denied*, 474 U.S. 1054 (1985). Spruytte, an inmate, alleged that the prison officials had refused to give a paperback dictionary mailed to him by his mother. Prison officials claimed, however, that they properly withheld the dictionary pursuant to Department of Correction directive. The

Department's directive was in direct conflict with a state Administrative Rule. The Administrative Rule was held to take precedence and, therefore, the directive had no legal effect. *Id.* at 506.

The proper analysis for determining whether a state law creates a protected property interest parallels the analysis for determining whether a state law creates a liberty interest. (See Petition for Writ of Certiorari, pp. 10-12.) The court in *Spruytte* applied the same analysis and held that "the [Administrative] Rule creates a federally protected interest." *Spruytte*, 753 F.2d at 508. The court distinguished *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and their progeny and concluded that:

> "The deprivation of Spruytte's protected property interest was 'caused by conduct pursuant to established state procedures.' . . . Thus, the adequacy of state post-deprivation procedure is irrelevant." *Spruytte v. Walters*, 753 F.2d at 510 (citation omitted).

As in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981) it is the established procedure, itself, that destroys the Petitioner's property interest without granting him proper procedural safeguards that are incorporated into the state statutes. Further, the Respondent is on notice that its rule conflicts with state law. Therefore, the decisions in *Spruytte* and *Logan* are completely analogous to the instant case.

Respondent, in its brief, places great reliance on the case of *Buclary v. Borough of North Hampton*, 1991 U.S. Dist. Lexis 9897 (Case No. 90-7950) (E.D. Pa. 1991) (Unreported) (Respondent's Appendix, pp. A2-A29). However, *Buclary* is easily distinguished. The plaintiffs in *Buclary* contended that the officials failed to act

pursuant to the established procedures. They, however, were not attacking the procedure, itself, as being deficient or the root cause of the deprivation, as is true in the instant case. This is where both the Respondent and the Ohio Supreme Court have failed in their analysis.

Thus, clearly, Petitioner's claim of a constitutionally protected property interest is well supported. Moreover, since the deprivation of Petitioner's property interest was caused by an invalid established procedure (as in *Habe*), the Ohio Supreme Court's failure to distinguish that procedure from state statute is clearly erroneous.

The Respondent, obviously, believes Petitioner Shirokey was not qualified for a promotion although he stood fourth on the eligible list. With this in mind the Respondent denied him a promotion by using its rule, without giving the Petitioner notice and a hearing in which to refute or rebut this negative opinion. The Respondent asks, in its brief, what process could have prevented an erroneous decision. Had the Respondent used the proper state statutes, the Petitioner would have been promoted in the normal course and served his probationary period. If, at the end, his performance was satisfactory, then the promotion would have been made permanent. If, however, his performance was unsatisfactory, then he would receive *notice* of his deficiencies and a rudimentary *hearing* before the demotion so as to have an opportunity to refute or rebut the charge that his performance was unsatisfactory—this is the Due Process and Predeprivation Procedure required. The Respondent, however, aborted this process by preventing Shirokey's name from being certified and thereby never promoting the Petitioner. The Respondent now argues that since it never promoted the Petitioner, he is not entitled to use, nor did it violate, the due process guarantees owing under the state statutes.

The Respondent attempts to justify the validity of its rule by relying on *State, ex rel. Firefighters v. East Cleveland*, 40 Ohio St. 3d 222, 533 N.E.2d 282 (1988). *East Cleveland* is easily distinguished from *Habe* and the instant case. The civil service rule that was the central issue in *Habe* is almost identical to the rule at issue in this case. On the contrary, the ordinance in *East Cleveland* did not address the issue of which person should be appointed; rather, it addressed whether the mayor was required to completely fill the vacancies to the level of the authorized complement in any particular job class. The ordinance was not in direct conflict with the state statutes since the state statutes did not expressly address this contingency—that all vacancies shall be filled to the total authorized complement. Moreover, in *Habe*, as in the case at bar, the regulation at issue was not an ordinance, but rather a civil service commission rule. The Respondent neglects to discuss *Habe*, which is directly on point; rather, it relies upon *East Cleveland* which can be distinguished.

The Respondent's argument that neither a promotional employee nor a probationary employee has a constitutionally protected property interest is a generalization. As seen above, whether a state law creates a protected property interest depends solely upon the nature of the substance of that particular law. The cases which the Respondent cites in its brief (Respondent's Brief in Opposition, p. 8, fn. 2) are founded upon state laws which can be distinguished from Ohio Revised Code §§124.45 through 124.49. (Petitioner's Appendix, pp. A50 through A57.) Moreover, it should be noted that the court in *Buclary*, upon which the Respondent relies in its brief, likewise concluded that the plaintiffs "by virtue of the inclusion on the certified

list, have a 'property interest' in the appointments." (Respondent's Appendix, A12.) Other jurisdictions, after proper analysis of the state law involved, have concluded that a promotion and probationary employees do have protected property interests. *See, Marvin v. King,* 734 F. Supp. 346 (S.D. Ind. 1990).

An excellent example of the chilling effect of the precedent set forth by this decision of the Ohio Supreme Court is the assertion by the Respondent that City of Cleveland Heights Codified Ordinance §137.11 is valid as it pertains to firefighters. This ordinance is not expressed in the charter and is in direct conflict with Ohio Revised Code §124.49. (Petitioner's Writ of Certiorari Appendix, page A57.) This ordinance expressly denies a firefighter the constitutional procedural due process guarantee that is set forth in the state civil service statute, O.R.C. §124.49. *Id.* However, according to the Respondent, the "Petitioner . . . could be demoted at anytime without right of appeal." (Respondent's Brief, p. 8, fn. 2.)

A logical extension of Respondent's argument, bolstered by this decision of the Ohio Supreme Court, would be that a city, without fear of liability under 42 U.S.C. §1983, could adopt a rule that conflicts with Ohio Revised Code §124.34 (See Petitioner's Appendix, page A47), and fire any employee of the classified service without notice or hearing, thereby denying that employee his constitutionally protected property interest and right of pre-deprivation notice and hearing. O.R.C. §124.34 is the same statute scrutinized by this Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

The Respondent, under the guise of "home rule," has enacted invalid civil service commission rules that deny their firefighters' constitutionally protected property interests—the right to pre-deprivation notice and hearing and an appeal process—which were created by the state legislature. These rules, under identical circumstances, have been held to be invalid. *Habe*, 56 Ohio St. 3d 117 (1990).

CONCLUSION

As demonstrated, the Petitioner's interest in his promotion as a firefighter rises to the level of a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, this case involves more than state issues. Furthermore, when the deprivation of a constitutionally protected property interest is caused by conduct pursuant to an established city procedure, that is illegal, and when it is that procedure that is at issue, the adequacy of state post-deprivation procedures is irrelevant. *Spruytte*, 753 F.2d at 510. The Petitioner, thus, has properly stated a valid claim under 42 U.S.C. §1983. Therefore, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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